88-717

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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM

BILLY L. ALLARD

PETITIONER

V.

MARTHA PARTEN FRECH, INDEPENDENT EXECUTRIX OF THE ESTATE OF BILLIE J. ALLARD, DECEASED

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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M+PP

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are (1) whether the anti-alienation clause of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1056 and other ERISA provisions prohibit the transfer of one-half of Petitioner's covered retirement plan to his deceased wife's devisees pursuant to Texas community property law, and (2) (as a subsidiary of (1), whether the issue of ERISA pre-emption of Texas community property's law application to Petitioner's plan has been preserved for review in this Honorable U. S. Supreme Court.

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The original opinions and judgments of the Supreme Court of Texas are reproduced in the Appendix as Exhibit A (A 1-33). The two opinions on rehearing of Justice Phillips and Justice Spears, joined by Justices Wallace and Kilgarlin, are reproduced in the Appendix as Exhibit B (B 1-23).

JURISDICTIONAL STATEMENT

The jurisdiction of the United States Supreme Court for this writ of certiorari is based on 28 U.S.C. 1257(3) because the application of Texas community property law, as interpreted by the Texas Supreme Court, is repugnant to the laws of the United States, specifically the anti-alienation and other provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sec. 1001 et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Art. 6, Cl. 2:

"This Constitution and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the Judges is every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

United States Code:

29 U.S.C. Sec. 1002(8): "The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan who is or may become entitled to a benefit thereunder."

29 U.S.C. Sec. 1002(12): "The term 'industry or activity affecting commerce' means any activity, business, or industry in commerce

or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce..."

29 U.S.C. Sec. 1003(a): "Except as provided in subsection (b) of this section...this subchapter shall apply to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce."

29 U.S.C. Sec. 1056(d): This is reproduced in its entirety as Exhibit "D" to Appendix (D 1-4).

29 U.S.C. Sec. 1144: This section is reproduced in its entirety as Exhibit "E" to Appendix (E 1-3).

STATEMENT OF THE CASE

A. Introductory Statement

This petition raises the issue of whether an order of a Texas probate court awarding one-half of Plaintiff's retirement benefits to Petitioner's

deceased wife's devisees conflicts with and is pre-empted by provisions of ERISA.

B. Statement of Facts and Raising of Issue Below

On April 29, 1986, the Honorable Probate Court Number 2 of Tarrant County, Texas, entered an order finding that one-half of Petitioner's retirement plan belonged to the estate of his deceased wife (Exhibit F to Appendix, F 1-2). The plan was from Petitioner's lengthy employment at General Dynamics (S.O.F. Vol. IV [Exhibit 3-5]). The appellant receives $1,008.00 a month from his retirement plan (S.O.F. Pg. 59, L 8-9). Under the terms of the options available to Petitioner at the time of retirement, he selected an option guaranteeing him retirement benefits for ten years (S.O.F., Pg. 57, L 23-25) There was no named beneficiary, and the plan provided in the absence of a named

beneficiary, the beneficiary would be the legal estate of the member (S.O.F. Vol. IV, Exhibit 3, p. 16 and Exhibit 4).

On March 13, 1986, the Court entered another order requiring Petitioner, inter alia, to turn over $27,709.83 in past and future retirement benefits to the estate (Exhibit G to Appendix, G 1-7). Findings of Fact and Conclusions of Law were filed concerning the probate court's first order (Exhibit H to Appendix, H 1-15), but not as to its later "turnover order."

Petitioner appealed to the Texas Court of Appeals Fort Worth, inter alia, on the grounds that the order wrongfully gave his wife a one-half share of Petitioner's retirement benefits under state law. On August 5, 1987, the Court of Appeals ruled against Petitioner in its opinion (Exhibit I to Appendix, I 1-36). The Texas Supreme Court granted

Petitioner's Application for Writ of Error on the question of whether one-half of the retirement benefits had been properly given to his deceased wife's estate, and hence her devisees, a child and two grandchildren, pursuant to Texas community property law. The Texas Supreme Court in a six-three decision ruled against Petitioner on May 4, 1988.

On May 19, 1988, in his Motion for Rehearing in the Texas Supreme Court, Petitioner raised for the first time the argument that federal law pre-empted the one-half interest granted the deceased in his covered retirement plan (Exhibit J to Appendix, J 1-20)

In an opinion delivered July 6, 1988, the three dissenting Justices, Spears, Kilgarlin and Wallace, concluded that the question of pre-emption was timely raised and should insure all of Plaintiff's benefits remain with him:

Judicial decisions that apply state law to an area that has been federally pre-empted are subject to nullification on the basis that federal law supercedes state law in that area, Kalb v. Feverstein, 308 U.S. 433, 439 (1940); see also Ex Parte Hovermale, 636 S.W.2d 828, 834 (Tex.App. - San Antonio 1982, no writ). Consequently, a claim of Federal pre-emption is entitled to consideration when it is raised. See International Longshoremen's Association v. Davis, ____ U.S. _____, 106 S.Ct. 1904, 1913 (1986)...Mr. Allard's federal pre-emption claim is properly before this court. (Emphasis added) (Page 2 of Justice Spears' Concurring and Dissenting Opinion On Motion for Rehearing).

The only other statement by any other justice concerning the timeliness

of Mr. Allard's claim was the single sentence concurring opinion of Chief Justice Phillips, unjoined by any other justice, that "I concur in the opinion of the court, only because Petitioner failed to timely present his argument that state law relating to employee benefit plans had been pre-empted by federal law" (Exhibit C to Appendix, C 1). The remaining five justices notably failed to comment on either the timeliness or validity of Petitioner's federal pre-emption claim.

REASONS FOR GRANTING THE WRIT

I. TEXAS COMMUNITY PROPERTY LAW HAS BEEN PRE-EMPTED BY ERISA AS APPLIED TO PETITIONER'S RETIREMENT PLAN.

A. NATIONAL IMPORTANCE OF ISSUE

This case is of great importance to the people of Texas and this nation because of the conflict between supreme federal law and Texas community property law (as well as possibly the laws of the

other seven community property states), and the disregard of supreme federal law (ERISA). That law serves the vital federal goal of establishing pension plan regulation as an exclusive federal concern and avoiding the confusion and chaos of a patchwork of local regulations, Shaw v. Delta Airlines, 463 U.S. 85, 99-100 (77 L.Ed.2d 790, 103 S.Ct. 2890 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 68 L.Ed.2d 402, 101 S.Ct. 1895 (1981); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. ____, 95 L.Ed.2d 39, 46-47; 107 S.Ct. 1549, 1552 (1987); Fort Halifax Packing Co. v. Coyne, ____ U.S. _____, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987).

Furthermore, Congress wanted retirement benefits to be received only by those whom Congress intended to receive the same. The Texas Supreme Court opinion conflicts with that policy, as well as several U.S. Supreme

Court decisions concerning the general pre-emptive scope of ERISA and the specific holding of MacLean v. Ford Motor Co., 831 F.2d 723 (7th Cir. 1987) that ERISA pre-empts state probate law.

(B) PERTINENT PRE-EMPTION PROVISIONS CONCERNING ALIENATION OF PLAN BENEFITS

Congress clarified ERISA in the Retirement Equity Act amendments effective January 1, 1985 to indicate when benefits could be taken from a participant to satisfy local domestic relations law under the anti-alienation, anti-assignment provisions of 29 U.S.C. Sec. 1056. The order divesting Petitioner of one-half of his benefits was signed and entered on April 29, 1986, after the effective date of this change. As noted in S. Rep. No. 575, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2565:

> "There is a divergence of opinion among the courts as to whether ERISA pre-empts state community property laws insofar as they relate to the rights of a married couple to benefits under the plan.
> ***
> The committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc...plan to be divided under certain circumstances. In order to provide rational rules for plan administrators, the committee believes it is necessary to establish guidelines for determining whether the exception to the spendthrift rules apply. In addition, the committee believes that conforming changes to the ERISA pre-emption provisions are necessary to insure that only those orders that are excepted from the spendthirft provisions are not pre-empted by ERISA." (Emphasis added).

Compare In Re Marriage of Campa, 89 Cal. App. 3d 113, 52 Cal. Rptr. 362 (1979), appeal dismissed, 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980) (holding ERISA does not pre-empt division of community assets in divorce) with Francis v. United Technology Corp. 458 F.Supp. 84 (N.D. Cal 1978) (holding

ERISA pre-empts domestic relations law). The House Report noted that the proposals were directed toward "removing any ambiguity in ERISA which might permit a pension plan to refuse to honor a legitimate state domestic relations order issued pursuant to divorce." H.R. Rep. No. 655, 98th Cong., 2nd Sess. 23 (1984).

In short, the purpose of the amendment was to clarify that divorce orders or child support orders were not pre-empted by ERISA. The order giving Mrs. Allard's devisees one-half of Mr. Allard's benefits is not a divorce order, but a probate one. Furthermore, the plain language of 29 U.S.C. Sec. 1056(d), the anti-alienation provision, does not countenance the probate court's action.

29 U.S.C. Sec. 1056(d)(3)(a) states that "Each pension shall provide that benefits provided under this plan may

not be assigned or alienated." 29 U.S.C. Sec. 1056(d)(3)(a) provides that the prohibition against alienation and assignment "shall not apply if the order is determined to be a qualified domestic relations order." A "domestic relations order" means "any judgment, decree, or order...which (1) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (2) is made pursuant to state domestic relations law (including a community property law) 29 U.S.C. Sec. 1056(d)(3)(B)(ii) (emphasis added).

The order divesting Mr. Allard of his retirement benefits in favor of Mrs. Allard's devisees does not satisfy this express, plain statutory definition. It does not grant marital property rights to Mrs. Allard or support to dependent children, but gives inheritance rights

to young devisees of Petitioner's deceased wife. Moreover, the probate court's order does not specify the name and last known mailing address of the participant, the period of payments, the amount of payments or any other information required by 29 U.S.C. Sec. 1056(d)(3)(c)(i)(ii) and (iii) and 29 U.S.C. (d)(3)(D). Accordingly, the probate order giving Mrs. Allard's heirs one-half of Petitioner's plan benefits does not constitute a "qualified domestic relations order" ("QDRO") within the meaning of 29 U.S.C. Sec. 1056(B) and is null and void under Art. 6, Cl. 2 of the U.S. Constitution.

(C) ERISA APPLIES TO PETITIONER'S PLAN

ERISA applies to any pension plans established or maintained by "any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. Sec. 1003(a)(1).

ERISA defines "industry or activity affecting commerce" very liberally as "any activity, business, or industry in which a labor dispute would hinder or obstruct commerce or the free flow of commerce." 29 U.S.C. Sec. 1002(12). It has been held that this expansive jurisdictional definition of industry or activity affecting commerce was intended by Congress to stretch the full range of its institutional power. Westerrowd v. David Freeman & Co., Inc., 724 F.2d 823, 825 (9th Cir. 1984).

As such, it is clear that General Dynamics, as a large publicly traded corporation, with deep involvement as a national defense contractor, satisfies the definition of covered employer. See Dissenting and Concurring Opinion of Justice Spears on Motion for Rehearing at page B2 (Exhibit B to Appendix, B 1-23). Accordingly, the pertinent ERISA provisions apply to Petitioner's plan.

D. THE ERISA PLAN REQUIREMENTS AND ANTI-ALIENATION PROVISIONS PRE-EMPT CONTRARY STATE LAW

In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. _____, 907 S.Ct. 1539, 1546 (1987), this Honorable Court examined how "We have observed in the past that the express pre-emption provisions are deliberately expansive and designed to establish pension plan regulation as exclusively a federal concern." Alessi v. Robestos-Manhattan, Inc., 451 U.S. 504, 523, 68 L.Ed.2d 402, 101 S.Ct. 1895 (1982). The express pre-emption provisions of ERISA contained in 29 U.S.C. Sec. 1144 certainly apply to this case.

Pilot Life, supra, held that the express pre-emption provisions prevented a Mississippi common law cause of action for "bad faith" processing of a claim in an ERISA regulated plan. ERISA pre-empts any state statutory or common law

having connection with any employee benefit plan covered by the act. Shaw v. Delta Airlines, 463 U.S. 85, 97, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). Furthermore, a state law not directly related to an employee benefit plan will nevertheless be pre-empted if the law applies to the benefits of such plans. Summers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter, Inc., 793 F.2d 1456, 1465 (5th Cir. 1986, cert. den.), _____U.S. _____, 107 S.Ct. 1298 (1987). As the question of who should receive Mr. Allard's retirement benefit between himself and his wife's devisees is intimately and directly related to the plan, it is clear the express ERISA pre-emption provisions apply.

Finally, in a case nearly directly on point, MacLean v. Ford Motor Co., 831 F2d 723, 727-728 (7th Cir. 1987) the issue was whether the assets of an ERISA

covered plan should be distributed in accordance with Indiana law of testamentary transfers or the plan's beneficiary designation. The plan provided that a group life insurance designation would control in the absence of a later change of designee. The court held that the plan's terms controlled over state law and that a beneficiary means a "..person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to benefits thereunder, 29 U.S.C. Sec. 1002(8)" 831 F.2d at 728. Similarly, in our case the plan's provisions that Mr. Allard should be the recipient of the benefits in the absence of a designation to the contrary, as well as the plan's express anti-alienation provisions, should control over contrary state law as expressed by the Texas Supreme Court majority. Mrs. Allard's devisees simply do not meet the

definition of eligible beneficiaries under federal law.

E. THE PRE-EMPTION ISSUE IS AVAILABLE FOR REVIEW

It is true that Petitioner did not present the issue of ERISA pre-emption until his motion for rehearing in the Texas Supreme Court. However, it is Petitioner's position that Texas and federal law allow the question of federal pre-emption, as a jurisdictional matter, to be raised at any time, as a direct or collateral attack. Ex Parte Hovermale, 636 S.W.2d 828, 834 (Tex.App. - San Antonio 1982, no writ, quoted with approval on Page B2 of the Dissenting and Concurring Opinion on Rehearing of Justice Spears on Motion for Rehearing, Exhibit "B" to Appendix, B 1-23). Chief Justice Phillips stated in his unjoined one-sentence concurring opinion that he concurred "in the opinion of the court only because Petitioner failed to timely

present his argument that state law relating to employee benefit plans has been pre-empted by federal law." (Exhibit C-1). The remaining five Justices did not join Chief Justice Phillips' concurring opinion that the ERISA claim had been waived. Accordingly, Petitioner maintains that the issue of federal pre-emption was not held to be waived by the Texas Supreme Court and hence is reviewable. Wright, Miller, Cooper & Gressman, Federal Practice and Procedure & Jurisdiction Sec. 4021, Webb's Fabulous Pharmacy, Inc. v. Bertwith 449 U. S. 155, 158 n.5 (1981). The very recent Texas case of Gorman v. Life Insurance Company of North America slip opinion, Tex.Ct.App. - Houston (1st Dist) (June 9, 1988) expressly held that ERISA could not be waived:

> "Appellants argue that Tenneco...waived ERISA pre-emption

by failing to raise it as an affirmative defense. A claim of federal pre-emption is a challenge to the court's subject matter jurisdiction and cannot be waived. International Longshoremen's Assn. v. Davis, 106 S.Ct. 1904 (1986), Barry v. Dymo Graphic Sys., Inc., 394 Mass. 830, 478 N.E.2d 707 (1985).

Even assuming, quite erroneously, that the Texas Supreme Court did not address the issue because of Texas law of procedural waiver, the very recent case of International Longshoremen's Association AFL-CIO v. Davis, 106 S.Ct. 1904 (1986) indicates the issue is receptive to review. Davis, supra, involved the National Labor Relations Act's pre-emption of a state law cause of action of an alleged supervisory employee for fraud and mis-representation. The Supreme Court

majority clearly concluded that the procedural default did not deprive the U.S. Supreme Court of jurisdiction to decide the pre-emption issue. That same principle should apply here.

CONCLUSION

WHEREFORE, Petitioner BILLY ALLARD prays that this Honorable U. S. Supreme Court grant his application for Writ of Certiorari to the Texas Supreme Court, and a final decision that the judgment of the Texas Supreme Court be reversed and judgment be entered granting Petitioner entire ownership and control of his General Dynamics retirement benefits.

Respectfully submitted,

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By: _____
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IN THE SUPREME COURT OF TEXAS

NO. C-6863

BILLY L. ALLARD,	X	
	X	
Petitioner	X	
	X	FROM TARRANT
V.	X	COUNTY SECOND
	X	DISTRICT
MARTHA PARTEN FRECH, Independent Executrix of the Estate of BILLIE J. ALLARD, Deceased,	X	
	X	
	X	
	X	
Respondent	X	

This case involves the proper characterization of retirement benefits and joint savings account proceeds in a probate action. The trial court rendered judgment characterizing the husband's retirement benefits and joint savings account proceeds as community property and awarded the wife's estate one-half of the husband's retirement benefits and one-half of the proceeds in the joint savings account. The court of appeals affirmed these findings of the trial court holding that the proceeds

from the husband's retirement plan were properly characterized as community property and that the funds held in the joint savings account were not held in joint tenancy with right of survivorship. 735 S.W.2d 311. We affirm.

Billie J. Allard and Billy L. Allard were married from 1945 until Mrs. Allard's death on April 11, 1983. Shortly after the marriage, Mr. Allard began working for General Dynamics Corporation and retired from his position in May, 1982. As a result of his employment, Mr. Allard selected an option providing for lifetime benefits with a guaranteed ten-year minimum, but such election was not signed by Mrs. Allard. Mr. Allard began receiving retirement benefits of $1,008.00 per month beginning June, 1982, and has received monthly benefits since that time.

On April 25, 1983, Martha Parten Frech, Mrs. Allard's sister, offered a will dated January 12, 1983 into probate. Mr. Allard contested the will and offered a later will dated March 33, 1983, which was rejected by the court. After the will offered by Mrs. Frech was admitted to probate, as independent executrix, she filed an "Inventory, Appraisement, and List of Claims" to which Mr. Allard objected. The issues presented during trial were limited by agreement of the parties to those concerning the value and characterization of certain property. After a trial on the merits, the trial court approved the inventory and signed the approval order awarding the decedent's estate one-half of the husband's retirement benefits, as well as one-half of the sums on deposit in a joint savings account containing a survivorship provision. The trial court

made additional findings which are not challenged by the parties and thus not before this court.

The court of appeals affirmed the judgment of the trial court regarding the husband's retirement benefits and the proceeds in the joint savings account. The court of appeals held that the benefits from the husband's retirement plan were properly characterized by the trial court as community property, thus, Mrs. Allard's half-interest in the retirement benefits properly passed under her will to the Allards' daughter and grandchildren. The court of appeals further held that a partition of community funds in Texas is not implicit in the mere execution of a joint tenancy with right of survivorship agreement, and that actual partition of community funds must be accomplished in an active not passive manner. Therefore, in light of the absence of a

partition agreement or spousal gift, the court of appeals concluded that the funds in the joint savings account were community property, with no right of survivorship in Mr. Allard. 735 S.W.2d at 317.

The initial question presented for this court's consideration involves the proper method to be utilized in dealing with retirement benefits in instances where the marriage is terminated by the death of the non-employee spouse. In this case, Mr. Allard possessed a retirement plan with General Dynamics in the amount of $102,080.00 which vested in 1982 prior to the death of his wife. Mr. Allard contends that his wife's one-half interest in his retirement benefits should not be allowed to continue after her death and pass under her will to the Allards' adult child and grandchildren. Focusing his argument in part on the inequities involved in allowing "able-

bodied young adults capable of supporting themselves" to share in his retirement benefits, Mr. Allard urges this court to apply the result of Valdez v. Ramirez, 574 S.W.2d 748 (Tex. 1978) to this case, or alternatively, to adopt the terminable interest rule. We decline to extend the holding in Valdez to the facts in this case. Likewise, we reject Mr. Allard's contention that the terminable interest rule should be adopted and applied in this case.

In Valdez, a United States Civil Service employee had been receiving retirement benefits under the Federal Civil Service Retirement Act for two years when her husband died intestate. In response to the issue of whether the deceased husband's interest in his wife's civil service retirement benefits was inheritable by his adult children of a former wife, we concluded that the wife's retirement benefits remaining

after her husband's death were her separate property; consequently, the benefits could not pass by the intestacy of her husband. Valdez, 574 S.W.2d at 751. This decision was primarily based on the preemption of Texas community property law by the requirements of the Federal Civil Service Act which provided for the payment of retirement benefits only to the employee, or in the case of the employee's minor, incapacitated or student children. We held that it would be contrary to the entire contract, policy, and plan of the Federal Retirement Act for nearly one-half of Mrs. Valdez's monthly payment to be taken from her and awarded to her deceased husband's adult children. Valdez, 574 S.W.2d at 750. Mr. Allard argues that the same equitable result should be reached in this case.

We hold that the court of appeals correctly distinguished Valdez from the

instant case. Valdez involved a federal retirement plan pursuant to a federal statutory scheme in which the employee-spouse exercised the joint and survivorship option provided by her retirement plan. Contrastingly, the instant case is distinguishable in that it involves a private retirement plan in which Mr. Allard selected an option, which was not signed by the deceased, guaranteeing him retirement benefits for ten years. The retirement plan in this case contained a joint and survivorship option which Mr. Allard declined to exercise. Consequently, the holding and result in Valdez is distinguishable here.

In further support of his position, Mr. Allard argues that according to Valdez, retirement benefits are non-probate assets, thus not subject to disposition by will and not subject to the rules of intestate distribution.

Valdez, 574 S.W.2d at 750. However, it is important to note that while Texas law recognizes provisions in pension plans as being nontestamentary in nature, section 450(a)(1) and (3) of the Texas Probate Code permit benefits under pension plans to "pass to a person designated by the decedent." Therefore, since there is no indication that the decedent, Mrs. Allard, agreed to the disposition of the retirement benefits, there appears to be no valid reason to deny Mrs. Allard the opportunity to dispose of her community interest in the retirement plan. Thus, we hold that in light of the settled martial property rule in Texas that a spouse has a community property interest in that portion of the retirement benefits of the opposite spouse earned during their marriage, the retirement benefits in this case were properly characterized as community property, and thus, one-half

of such benefits was properly included in the wife's estate. See Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

Additionally, Mr. Allard urges this court to adopt the terminable interest rule which provides that the non-employee spouse's pension interest terminates at the death of either spouse. See Matter of Estate of Allen, 108 Cal.App.3d 614, 166 Cal.Rptr.653 (Court of Appeals [1st Dist.] 1980); Waite v. Waite. 6 Cal.3d 461, 99 Cal.Rptr. 325, 33 Cal.Rptr. 257, 384 P.2d 649 (1963). In spite of the application of the rule by the California courts in these three cases, it has been widely viewed in California as creating an unfair deprivation and misallocation of the non-employee spouse's full share of pension benefits

representing community property accrued and accumulated during the marriage to the employee spouse. See Taylor v. Taylor, 189 Cal.App.3d 435, 234 Cal.Rptr. 486 (Cal. Ct.App. 1987). California's struggle with the terminable interest rule culminated in 1986 with an amendment to the California Family Law Act specifically requiring the court to assure that each party receives a full community property share of the retirement plan. Cal. Civ. Code Ann. Sec. 4800.8 (West.Supp. 1987). This legislation was intended to abolish the terminable interest rule and has since been held to be retroactive. Taylor, 235 Cal.Rptr. at 491. We find no reason in this case to set aside the basic principles of community property law, which when applied in this case, entitle the non-employee spouse to her share of the retirement benefits. In regard to Mr. Allard's request that this

court adopt the terminable interest rule, we decline to do so and conclude that such matter is better left to the legislature.

The second point raised by Mr. Allard challenges the court of appeals' finding that one-half of the sums on deposit in a joint savings account having a notation of a joint tenancy with right of survivorship was the property of the wife's estate. The bank account was funded with community property and was not subject to any partition agreement or spousal gift. We hold that in light of the absence of a partition agreement or spousal gift, the court of appeals correctly affirmed the trial court's finding that the savings account was not a valid joint account with right of survivorship.

This holding is based on a firmly rooted principle of community property law which requires the actual partition

of community property before a valid joint tenancy with the right of survivorship can be created. See Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981); Williams v. McKnight, 402 S.W.2d 505, 507 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 569 (1961). In reliance on section 46(b) of the Probate Code, which allows spouses to create a joint tenancy with right of survivorship in bank accounts, Mr. Allard asserts that the survivorship language on the signature card manifests a clear intention to partition the property, even though there is no partition language on the signature card. This assertion is without merit. We conclude that a partition was not implicit in the agreement because the language of 46(b) was not intended to abrogate the requirement that a valid partition of community property must be executed in order to establish a joint

tenancy with right of survivorship. Jameson v. Bain, 693 S.W.2d 676, 679 (Tex.App.--San Antonio 1985, no writ).

The judgment of the court of appeals is affirmed.

/s/ Oscar H. Mauzy
Oscar H. Mauzy
Justice

OPINION DELIVERED: May 4, 1988

Dissenting and Concurring Opinion by Justice Spears joined by Justices Wallace and Kilgarlin.

Concurring Opinion by Justice Ray.

IN THE SUPREME COURT OF TEXAS

NO. C-6863

BILLY L. ALLARD,	X	
	X	
Petitioner	X	
	X	FROM TARRANT
V.	X	COUNTY SECOND
	X	DISTRICT
MARTHA PARTEN FRECH,	X	
Independent Executrix of	X	
the Estate of Billie J.	X	
Allard, Deceased,	X	
	X	
Respondent	X	

DISSENTING AND CONCURRING OPINION

Billy Allard was employed by General Dynamics Corporation for thirty-one years. During his lengthy employment with the company, he made regular contributions to a qualified retirement plan and earned the right to receive monthly retirement benefits of $1,008.00 for the remainder of his life. Mr. Allard began receiving his retirement benefits in June, 1982, but upon Mrs. Allard's death in 1983, her

estate claimed one-half of Mr. Allard's retirement benefits. The majority holds that the beneficiaries of Mrs. Allard's estate -- two able-bodied young adults for whom the retirement benefits were never intended -- are entitled to one-half of Mr. Allard's retirement pay. From this holding, I dissent.

The majority sets forth the rule that a non-employee spouse may bequeath to third parties his or her community interest in the employee spouse's vested retirement plan. The majority ignores the patent inequity of this rule. Permitting a non-employee spouse to give away one-half of the employee's retirement benefits contravenes the very purpose of retirement plans and violates the legitimate expectations of the elderly who rely on retirement benefits to sustain them in their declining years. The court of appeals and the concurring opinion in this court have

acknowledged the unfairness inherent in divesting an employee of hard-earned retirement benefits and diverting those benefits to healthy young adults capable of self support. Simply acknowledging the unfairness of this situation, however, does not restore financial security and support to the elderly who have been stripped of retirement benefits.

This court has in the past directly confronted inequity and rejected outdated doctrines that inflict harsh and unfair results on those least able to bear the loss. See, e.g., Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983) (pecuniary loss rule abolished as limitation on recovery under Texas Wrongful Death Act); Farley v. M & M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (doctrine of assumption of risk abolished). When faced with obvious inequity, this court has refused to

declare itself helpless because of precedent. An equally forceful judicial response is demanded when retired employees are deprived of hard-earned and needed retirement benefits.

Retirement benefits represent additional compensation to an employee who has contributed years of faithful and continuous service to his employer. Lee v. Lee, 112 Tex. 392, 247 S.W. 828, 833 (1923). Retirement payments, whether administered through a governmental or private pension plan, replace the employee's salary and frequently represent the primary source of financial support and security for the retired employee and his or her spouse. Valdez v. Ramirez, 574 S.W.2d 748, 750 (Tex. 1978). These benefits play a critical role in the financial survival of the elderly after the wage earner no longer works.

Like the personal earnings of spouses, retirement benefits earned during a marriage are community property. Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661, 662, 666 (Tex. 1976). Unlike other forms of community property, however, retirement benefits are meant to be shared only by the spouses. Estate of Allen, 108 Cal.App.3d 614, 619, 166 Cal.Rptr. 653, 656 (Ct.App. 1980). Retirement benefits therefore constitute a unique component of the community estate because they are designed solely to sustain the retired employee and his or her spouse for the remainder of their lives or for a designated period of time. Id. Retirement benefits are not designed to enrich estates or enhance the fortunes of young adults.

At divorce, each spouse's needs for ongoing financial support continue, and

thus, retirement benefits are properly divided between the spouses. Taggart, 552 S.W.2d at 423. By contrast, when the spouse of a retired employee dies, his or her need for financial support ends. The retired employee, however, continues to depend on retirement benefits for economic survival. Waite v. Waite, 6 Cal.3d 461, 474, 492 P.2d 13, 21, 99 Cal.Rptr. 325, 333 (1972). It is contrary to the very purpose of retirement plans to appropriate money from a surviving employee spouse and award it to young, robust, able-bodied adults who are capable of supporting themselves. Valdez, 574 S.W.2d at 750. The majority, by mechanically applying community property principles and probate rules, fails to recognize both the purpose and the unique nature of retirement benefits.

The fact that existing community property principles and probate rules

permit a non-employee spouse to give away one-half of the employee spouse's retirement pay demonstrates the critical need for a rule to ensure that retirement benefits reach those who earned them and need them. The interests of the elderly require either the adoption of a terminable interest rule to govern the non-employee spouse's community interest in retirement benefits upon that spouse's death, or alternatively, the characterization of retirement benefits as nonprobate community property assets. Waite, 6 Cal.3d at 470-474, 492 P.2d at 19-22; 99 Cal. Rptr. at 330-334; see also Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1111 (1984).

Under a terminable interest rule, a non-employee spouse's interest in retirement benefits would not extend to benefits payable after his or her death.

The community interest of the decedent would automatically terminate at his or her own death, and the post-death retirement benefits would become the separate property of the spouse whose employment brought the benefits into existence. Under such a rule, retirement benefits would support only the employee spouse and could not be diverted into the hands of young adults.

The majority has declined to adopt a terminable interest rule, focusing on the problems experienced by California courts in attempting to implement that doctrine. It is important to note, however, that the California rule, unlike the rule proposed here, contained two prongs. First, California's rule provided that the community interest in retirement benefits expired with the death of the employee so that his or her surviving spouse was not assured of any share of continuing benefits. Benson v.

City of Los Angeles, 60 Cal.2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). Second, the rule held that the community interest in retirement benefits ended upon the death of the non-employee spouse. Waite v. Waite, 6 Cal.3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972). California's rule, as the majority notes, was subject to criticism, but the assault centered on the Benson prong of the rule that divested a surviving spouse of any contingent benefits upon the death of the employee spouse. See, e.g., Reppy, Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA, 25 U.C.L.A. L. Rev. 417 (1978); Thiede, The Community Property Interest of the Non-Employee Spouse in Private Retirement Benefits, 9 U.S.F.L. Rev. 635 (1975). As stated by one California appellate court, that aspect of California's terminable interest rule

was patently unfair to the non-employee spouse, failed to recognize the purpose of the benefits involved, and improperly relied on the implied repeal of the California statute that, unlike Texas law, prohibits the unilateral gift of community funds. Chirmside v. Board of Administration, 143 Cal. App.3d 205, 209, 191 Cal. Rptr. 605, 607 (Ct. App. 1983). The California legislature abolished the terminable interest rule in 1986 but, interestingly, did so only with regard to divorce cases. Cal. Civ. Code Ann. Sec. 4800.8 (West Supp. 1987). Consequently, even if the California experience has relevance to this court's application of Texas community property principles, it in no way negates the viability of a rule that terminates the non-employee spouse's community interest in retirement benefits upon his or her own death.

The majority also declines to characterize retirement benefits as a nonprobate asset. This court, however, has already recognized the nonprobate nature of property passing at death pursuant to the terms of a contributory retirement plan. Valdez, 574 S.W.2d at 750. Further, the Texas legislature has evinced a favorable attitude toward nontestamentary transfers of property. The Texas Probate Code expressly recognizes various types of nonprobate assets, including provisions in retirement accounts. Tex. Prob. Code Ann. Sec. 450 (Vernon Supp. 1988).

There is no reason to permit nontestamentary transfers of property pursuant to the terms of some contributory retirement plans but not pursuant to others. In this case, Mr. Allard earned the right to retirement benefits through his long employment with General Dynamics. Pursuant to

section 5.22(a) of the Texas Family Code, he had the sole right to manage and control the retirement plan as long as his actions did not defraud his wife's interest. Tex.Fam. Code Ann. Sec. 5.22(a)(Vernon 1975); Krueger v. Williams, 359 S.W.2d 48, 51 (Tex.1962). There are neither pleadings nor evidence to suggest fraud by Mr. Allard. He is thus held to have acted within his authority when he contracted with his employer for the right to receive retirement benefits for the remainder of his life. That contract, not Mrs. Allard's will, is the instrument that properly governs the disposition of Mr. Allard's retirement benefits.

The Texas Probate Code contemplates the designation of a beneficiary by the person who is an actual party to the contract, note, or retirement account in question. Tex. Prob. Code Ann. Sec. 450 (Vernon Supp. 1988). Section 450 thus

addresses one form of nontestamentary transfer of property; it does not purport to exclude all other forms of nontestamentary transfers. It is incorrect, therefore, to refuse to characterize Mr. Allard's retirement plan as a nonprobate asset on the basis of section 450. Mrs. Allard was not a party to the retirement plan contract between Mr. Allard and General Dynamics. It makes no sense to deprive Mr. Allard of one-half of his retirement benefits because Mrs. Allard did not make a beneficiary designation in an instrument to which she was not a party.

Mr. Allard is entitled to enjoy full retirement benefits for the remainder of his life. I would therefore reverse the judgment of the court of appeals on this point. I otherwise concur with the majority as to the disposition of the funds on deposit in the joint savings account.

/s/ Franklin Spears, Justice

Justices Wallace and Kilgarlin join in this concurring and dissenting opinion.

Opinion delivered: May 4, 1988.

IN THE SUPREME COURT OF TEXAS

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BILLY L. ALLARD,	X	
	X	
Petitioner	X	
	X	FROM TARRANT
V.	X	COUNTY SECOND
	X	DISTRICT
MARTHA PARTEN FRECH, Independent Executrix of the Estate of Billie J. Allard, Deceased,	X	
	X	
Respondent	X	

CONCURRING OPINION

I agree with the conclusion of the court of appeals that pension plans are designed primarily for the benefit of the employee and the non-employee spouse and not the able-bodied adult children. However, I concur with the majority in declining to reclassify the retirement benefits as a non-probate asset or to adopt the terminable interest rule. Although equitable and public policy considerations could warrant the application of these doctrines, there is

no workable solution based upon community property principles or the Texas Probate Code.

It is submitted that there is an alternative available in order to avoid the unfortunate result that Mr. Allard has experienced. In order to qualify the pension plan benefits as a non-probate asset, the spouses must agree in writing that the surviving spouse will retain all rights to the deceased spouse's community property interest in the pension benefits. The Texas Probate Code classifies certain pension plan provisions as nontestamentary transfers provided that the property rights and pension plans pass to a person designated by the decedent. TEX. PROB. CODE ANN. SEC. 450 (a)(1) 7 (3) (Vernon 1988).

In the instant case, Mrs. Allard, the decedent and non-employee spouse, did nothing to comply with the Texas

Probate Code requirements for nontestamentary transfers because she did not make a written agreement to dispose of her community interest in the pension benefits by transferring them to a designated person. Furthermore, the pension plan provided a joint survivor option which the Allards failed to exercise. Thus, there is no basis to conclude that the employee spouse should receive a nontestamentary transfer of the non-employee spouse's community property interest in the retirement plan.

Additionally, adoption of the terminable interest rule would require a recharacterization of the non-employee spouse's community interest and a divestment of her rights upon her death. Texas community property rights are constitutional in origin and this court and the Texas Legislature must observe constitutional restrictions on the

recharacterization of property. See e.g., Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981); Williams v. McKnight, 402 S.W.2d 505, 507 (Tex. 1966); Arnold v. Leonard, 114 Tex. 535, 547, 273 S.W. 799, 802 (1925); TEX. CONST. art. XVI, sec. 15. A recent constitutional amendment provides that "spouses may agree in writing that all or part of their community property becomes the property of their surviving spouse on the death of a spouse". TEX. CONST. ANN. art. XVI, sec. 15 none (Vernon Supp. 1988). However, even if held to be retroactive, this case does not warrant that application because there is no evidence that Mrs. Allard made a written agreement that her community property interest become the property of Mr. Allard upon her death.

In conclusion, I sympathize with Mr. Allard's position, but fundamental community property principles and the

Texas Probate Code cannot support the divestment of the community property interest of Mrs. Allard or the qualification of the retirement benefits as a non-probate asset.

/s/ C.L. Ray, Justice

OPINION DELIVERED: May 4, 1988.

IN THE SUPREME COURT OF TEXAS

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the Estate of Billie J.	X	
Allard, Deceased,	X	
	X	
Respondent	X	

DISSENTING AND CONCURRING OPINION
ON MOTION FOR REHEARING

The dissenting and concurring opinion delivered May 4, 1988 is withdrawn and the following is substituted:

Billy Allard was employed by General Dynamics Corporation for thirty-one years. During his lengthy employment with the company, he made regular contributions to a qualified retirement plan and earned the right to receive monthly retirement benefits of $1,008.00 for the remainder of his life.

Mr. Allard began receiving his retirement benefits in June, 1982, but upon Mrs. Allard's death in 1983, her estate claimed one-half of Mr. Allard's retirement benefits. The majority holds that the beneficiaries of Mrs. Allard's estate -- two able-bodied young adults for whom the retirement benefits were never intended -- are entitled to one-half of Mr. Allard's retirement pay. I dissent from this holding for two reasons. First, the claim of the will beneficiaries to Mr. Allard's retirement benefits is precluded by federal law. Second, even in the absence of controlling federal law, the holding of the majority contravenes the very purpose of retirement plans.

In his motion for rehearing, Mr. Allard asserts that state law relating to employee benefit plans is federally pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), 29

U.S.C. sec. 1001 et seq. (1985). Under the Supremacy Clause of the United States Constitution, federal law that regulates a specific field of activity overrides state law in that area. U.S. Const. art. V. cl. 2; Free v. Bland, 369 U.S. at 666, 670. Judicial decisions that apply state law to an area that has been federally pre-empted are subject to nullification on the basis that federal law supercedes state law in that area. Kalb v. Feuerstein, 308 U.S. 433, 439 (1940); see also Ex Parte Hovermale, 636 S.W.2d 828, 834 (Tex.App. -- San Antonio 1982, no writ). Consequently, a claim of federal pre-emption is entitled to consideration when it is raised. See International Longshoreman's Ass'n v. Davis, ___ U.S. ____, 106 S. Ct. 1904, 1913 (1986). A claim of federal pre-emption under ERISA warrants particular consideration because the pre-emption provisions of that statute are designed

to establish pension plan regulation as an exclusive federal concern. Pilot Life Ins. Co. v. Dedeaux, ___ U. S. _____, 107 S.Ct. 1549, 1552 (1987). Mr. Allard's federal pre-emption claim is properly before this court.

In light of the provisions of ERISA and the case law construing that federal statute, it is readily apparent that ERISA pre-empts state law in this case and prohibits the divestiture of any portion of the retirement benefits to which Mr. Allard is entitled under the General Dynamics pension plan. In 1974, ERISA was enacted to assure employees that they would not be deprived of reasonably anticipated pension benefits. Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1409 (2nd Cir. 1985), cert. denied, ___ U.S. ____, 106 S.Ct. 1167 (1986). ERISA is remedial legislation and is to be liberally construed in favor of protecting participants in

employee benefit plans. Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984).

As a threshold matter, the retirement plan established by General Dynamics is clearly subject to the provisions of ERISA. ERISA comprehensively regulates "employee pension benefit plans." 29 U.S.C. sec. 1002(2)(A) (Supp. 1988); Sams v. N.L. Indus., Inc., 735 S.W.2d 486, 488 (Tex.App. -- Houston [1st Dist.] 1987, no writ). Any plan that provides retirement income is an "employee pension benefit plan" and will be subject to all of ERISA's requirements unless specifically excepted. 29 U.S.C. sec. 1002 (2)(A)(i)(Supp. 1988). Further, ERISA applies to pension plans established or maintained by "any employer engaged in commerce or in any industry or activity affecting commerce." Id. at sec. 1003(a)(1). The

act itself broadly defines "industry or activity affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce." Id. at sec. 1002(12). The statutory definition of "industry or activity affecting commerce" is intended to be expansive rather than limiting, reflecting Congress' desire to regulate within the full sweep of its constitutional authority. Winterrowd v. David Freedman & Co., Inc., 724 F.2d 823, 825 (9th Cir. 1984). Because of the broad scope of its coverage, ERISA clearly applies to General Dynamics as an "industry or activity affecting commerce" and to the General Dynamics' retirement plan as an "employee pension benefit plan."

ERISA specifically provides that the benefits under a pension plan may not be assigned or alienated. 29 U.S.C.

sec. 1056(d)(1)(1985). The act recognizes only one exception to this prohibition -- benefits may be assigned or alienated when a "qualified domestic relations order" so provides. Id. at sec. 1056(d)(3)(A). The act defines a "qualified domestic relations order" as an order that "related to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant" and which "is made pursuant to state domestic relations law." Id. at sec. 1056(d)(3)(B)(ii). The order divesting Mr. Allard of one-half of his retirement benefits in favor of the devisees of Mrs. Allard is not a qualified domestic relations order. It does not accord marital property rights to Mrs. Allard nor provide child support to any dependent of Mr. Allard. The anti-alienation provision of ERISA thus

applies to Mr. Allard's retirement benefits. Id. at sec. 1056 (d)(1).

It is well established that claims relating to ERISA benefits based on state statutes and common law have been pre-empted and prohibited by ERISA. 29 U.S.C. sec. 1144 (a) (1985); Pilot Life Ins. Co., 107 S.Ct. at 1552-53, 1558; Holland v. Burlington Indus., Inc., 772 F.2d at 1140, 1146-48 (4th Cir. 1985); Winterrowd, 724 F.2d at 826. ERISA broadly supercedes any state law having a connection with or reference to any employee benefit plan covered by the act. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). A state law that does not expressly concern employee benefit plans will nevertheless be pre-empted if the law applies to the benefits of such plans. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456,

1465 (5th Cir. 1986), cert. denied ____ U. S. ____, 107 S.Ct. 1298 (1987).

This court has already recognized that federal law may pre-empt Texas community property law and probate law when retirement benefits are the subject of the claim. Valdez v. Ramirez, 574 S.W.2d 748, 751 (Tex. 1978) (Federal Civil Service Retirement Act held to pre-empt Texas probate and community property law regarding creation of joint survivorship annuity). Specifically, ERISA has been held to pre-empt state law when ERISA benefits are the subject of the claim. See, e.g., Sams v. N.L. Indus., Inc., 735 S.W.2d 486, 489 (Tex.App. -- Houston [1st Dist.] 1987, no writ) (employee's common law causes of action for breach of contract, wrongful discharge, and willful refusal to pay sick leave pre-empted by ERISA); Giles v. TI Employees Pension Plan, 715 S.W.2d 58, 59 (Tex.App. -- Dallas 1986,

writ ref'd n.r.e.) (ERISA pre-empted employee's claim under the Deceptive Trade Practices Act that the amount of retirement pay due upon employee's retirement had been misrepresented.)

The principles of Texas community property law and probate law, as applied by the majority of this case, clearly relate to ERISA benefits. The state law applied to Mr. Allard's retirement benefits has a direct impact on the relationship between two of the principal ERISA entities -- the plan and the plan's beneficiary. See Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 556 (6th Cir. 1987). As a result, ERISA pre-empts state law as it relates to the allocation of Mr. Allard's retirement benefits. Section 1061 of ERISA prohibits the alienation of Mr. Allard's retirement benefits, and, thus, the devisees under Mrs. Allard's will

have no claim to any portion of Mr. Allard's retirement benefits.

While it is clear that federal law pre-empts state law as to Mr. Allard's retirement benefits, there is a second, equally important reason that the majority's holding should not govern this cause. The majority sets forth the rule that under Texas law a non-employee spouse may bequeath to third parties his or her community interest in the employee spouse's vested retirement plan. The majority ignores the patent inequity of this rule. Permitting a non-employee spouse to give away one-half of the employee's retirement benefits contravenes the very purpose of retirement plans and violates the legitimate expectations of the elderly who rely on retirement benefits to sustain them in their declining years. The court of appeals and the concurring opinion in this court have acknowledged

the unfairness inherent in divesting an employee of hard-earned retirement benefits and diverting those benefits to healthy young adults capable of self support. Simply acknowledging the unfairness of this situation, however, does not restore financial security and support to the elderly who have been stripped of retirement benefits.

This court has in the past directly confronted inequity and rejected outdated doctrines that inflict harsh and unfair results on those least able to bear the loss. See, e.g., Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983) (pecuniary loss rule abolished as limitation on recovery under Texas Wrongful Death Act); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (doctrine of assumption of risk abolished). When faced with obvious inequity, this court has refused to declare itself helpless because of

precedent. An equally forceful judicial response is demanded when retired employees are deprived of hard-earned and needed retirement benefits.

Retirement benefits represent additional compensation to an employee who has contributed years of faithful and continuous service to his employer. Lee v. Lee, 112 Tex. 392, 247 S.W. 828, 833 (1923). Retirement payments, whether administered through a governmental or private pension plan, replace the employee's salary and frequently represent the primary source of financial support and security for the retired employee and his or her spouse. Valdez v. Ramirez, 574 S.W.2d 748, 750 (Tex. 1978). These benefits play a critical role in the financial survival of the elderly after the wage earner no longer works.

Like the personal earnings of spouses, retirement benefits earned

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At divorce, each spouse's needs for ongoing financial support continue, and thus, retirement benefits are properly divided between the spouses. Taggart,

552 S.W.2d at 423. By contrast, when the spouse of a retired employee dies, his or her need for financial support ends. The retired employee, however, continues to depend on retirement benefits for economic survival. Waite v. Waite, 6 Cal.3d 461, 474, 492 P.2d 13, 21, 99 Cal. Rptr. 325, 333 (1972). It is contrary to the very purpose of retirement plans to appropriate money from a surviving employee spouse and award it to young, robust, able-bodied adults who are capable of supporting themselves. Valdez, 574 S.W.2d at 750. The majority, by mechanically applying community property principles and probate rules, fails to recognize both the purpose and the unique nature of retirement benefits.

The fact that state law may be construed to permit a non-employee spouse to give away one-half of the employee spouse's retirement pay

demonstrates the critical need for a rule to ensure that retirement benefits reach those who earned them and need them. If state law were held to be controlling in this area, the interests of the elderly would require either the adoption of a terminable interest rule to govern the non-employee spouse's community interest in retirement benefits upon that spouse's death, or alternatively, the characterization of retirement benefits as nonprobate community property assets. Waite, 6 Cal.3d at 470, 474, 492 P.2d at 19-22; 99 Cal. Rptr. at 330-334; see also Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1111 (1984).

Under a terminable interest rule, a non-employee spouse's interest in retirement benefits would not extend to benefits payable after his or her death. The community interest of the decedent

would automatically terminate at his or her own death, and the post-death retirement benefits would become the separate property of the spouse whose employment brought the benefits into existence. Under such a rule, retirement benefits would support only the employee spouse and could not be diverted into the hands of young adults.

The majority has declined to adopt a terminable interest rule, focusing on the problems experienced by California courts in attempting to implement that doctrine. It is important to note, however, that the California rule, unlike the rule proposed here, contained two prongs. First, California's rule provided that the community interest in retirement benefits expired with the death of the employee so that his or her surviving spouse was not assured of any share of continuing benefits. Benson v. City of Los Angeles, 60 Cal.2d 355, 384

P.2d 649, 33 Cal. Rptr. 257 (1963) (en banc). Second, the rule held that the community interest in retirement benefits ended upon the death of the non-employee spouse. Waite v. Waite, 6 Cal.3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972). California's rule, as the majority notes, was subject to criticism, but the assault centered on the Benson prong of the rule that divested a surviving spouse of any contingent benefits upon the death of the employee spouse. See, e.g., Reppy, Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA, 25 U.C.L.A. L. Rev. 417 (1978); Thiede, The Community Property Interest of the Non-Employee Spouse in Private Retirement Benefits, 9 U.S.F.L. Rev. 635 (1975). As stated by one California appellate court, that aspect of California's terminable interest rule was patently

unfair to the non-employee spouse, failed to recognize the purpose of the benefits involved, and improperly relied on the implied repeal of the California statute that, unlike Texas law, prohibits the unilateral gift of community funds. Chirmside v. Board of Administration, 143 Cal. App.3d 205, 209, 191 Cal. Rptr. 605, 607 (Ct. App. 1983). The California legislature abolished the terminable interest rule in 1986 but, interestingly, did so only with regard to divorce cases. Cal. Civ. Code Ann. sec. 4800.8 (West Supp. 1988). Consequently, even if the California experience has relevance to this court's application of Texas community property principles, it in no way negates the viability of a rule that terminates the non-employee spouse's community interest in retirement benefits upon his or her own death.

The majority also declines to characterize retirement benefits as a nonprobate asset. This court, however, has already recognized the nonprobate nature of property passing at death pursuant to the terms of a contributory retirement plan. Valdez, 574 S.W.2d at 750. Further, the Texas legislature has evinced a favorable attitude toward nontestamentary transfers of property. The Texas Probate Code expressly recognizes various types of nonprobate assets, including provisions in retirement accounts. Tex. Prob. Code Ann. sec. 450 (Vernon Supp. 1988).

There is no reason to permit nontestamentary transfers of property pursuant to the terms of some contributory retirement plans but not pursuant to others. In this case, Mr. Allard earned the right to retirement benefits through his long employment with General Dynamics. Pursuant to

section 5.22(a) of the Texas Family Code, he had the sole right to manage and control the retirement plan as long as his actions did not defraud his wife's interest. Tex. Fam. Code Ann. sec. 5.22(a) (Vernon 1975); Krueger v. Williams, 359 S.W.2d 48, 51 (Tex. 1962). There are neither pleadings nor evidence to suggest fraud by Mr. Allard. He is thus held to have acted within his authority when he contracted with his employer for the right to receive retirement benefits for the remainder of his life. That contract, not Mrs. Allard's will, is the instrument that properly governs the disposition of Mr. Allard's retirement benefits.

The Texas Probate Code contemplates the designation of a beneficiary by the person who is an actual party to the contract, note, or retirement account in question. Tex. Prob. Code Ann. sec. 450 (Vernon Supp. 1988). Section 450 thus

addresses one form of nontestamentary transfer of property; it does not purport to exclude all other forms of nontestamentary transfers. It is incorrect, therefore, to refuse to characterize Mr. Allard's retirement plan as a nonprobate asset on the basis of section 450. Mrs. Allard was not a party to the retirement plan contract between Mr. Allard and General Dynamics. It makes no sense to deprive Mr. Allard of one-half of his retirement benefits because Mrs. Allard did not make a beneficiary designation in an instrument to which she was not a party.

Mr. Allard is entitled to enjoy full retirement benefits for the remainder of his life. Federal law overrides state law in this matter and prohibits the allocation of any portion of Mr. Allard's retirement benefits to Mrs. Allard's devisees. Even if Mr. Allard did not raise his federal pre-

emption claim in a timely manner, the very purpose of retirement plans mandates that retirement benefits go to the elderly who earned them and need them. I would therefore reverse the judgment of the court of appeals on this point. I otherwise concur with the majority as to the disposition of the funds on deposit in the joint savings account.

/s/ Franklin Spears,
Justice

Justices Wallace and Kilgarlin join in this dissenting and concurring opinion.

Opinion delivered: July 6, 1988.

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	X	
Respondent	X	

CONCURRING OPINION ON MOTION FOR REHEARING

I concur in the opinion of the court only because petitioner failed to timely present his argument that state law relating to employee benefits plans has been pre-empted by federal law.

/s/ Thomas R. Phillips
Chief Justice

OPINION DELIVERED: July 6, 1988

29 U.S.C. Sec. 1056 - LABOR Ch. 18

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable

benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For the purpose of this paragraph--

(i) the term "qualified domestic relations order" means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies--

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order.

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this sub-paragraph only if such order--

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) In the case of any payment before a participant has separated from service, a domestic relations order

shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee--

(I) on or after the date on which the participant attains (or would have attained) the earliest retirement age.

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the

alternate payee and his or her subsequent spouse.)

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" has the meaning given such term by section 1055(h)(3) of this title, except that in the case of any individual account plan, the earliest retirement age shall be the date which is 10 years before the normal retirement age.

(F) To the extent provided in any qualified domestic relations order--

(i) the former spouse of a participant shall be treated as a surviving spouse of such

participant for purposes of section 1055 of this title, and

(ii) if married for at least 1 year, the former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan--

(I) the plan administrator shall promptly notify the participant and any other alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures--

(I) shall be in writing.

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee

with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within 18 months the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons entitled thereto.

(iii) If within 18 months--

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period shall be applied prospectively only.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in--

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable

under a plan with respect to such participant.

(L) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

29 U.S.C. Section 1144. OTHER LAWS

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of

any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. Sec. 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section--

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are

governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section--

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by

the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or

administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United

States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

F-1

NO. 83-793-1

THE ESTATE OF	X	IN THE PROBATE COURT
	X	
BILLIE J. ALLARD	X	NUMBER ONE OF
	X	
DECEASED	X	TARRANT COUNTY,
	X	TEXAS

ORDER

On the 22nd day of April, 1986 came on for hearing Movant's Motion to Compel Delivery of Property, and appeared the parties and their attorney, and the Court after having considered the Motion to Compel Delivery of Property, the Order or Inventory, Appraisement and List of Claims and Objections to Same, and the Court having also heard evidence and argument of counsel finds that the following order should be rendered, it is therefore

ORDERED, ADJUDGED and DECREED that the Contestant BILLY L. ALLARD shall deliver to this Court at 10:00 a.m. on April 30, 1986 the following:

1. Jewelry described as follows:

a. Two karat diamond in deceased's original engagement ring;

b. Ladies 14 karat white gold fashion swirl ring with 38 diamonds with center stone missing;

c. One round diamond Gemological Institute Grading applied approximately near colorless, J in color grading with visile natural inclusions 11 grading measuring approximately 8.5mm x5.3mm weighing approximately 2.35 karats;

d. 18 karat yellow gold Inca Medallion pin;

e. 14 karat yellow gold ankle bracelet;

f. 18" strand of small Ivory beads;

g. 20" strand Majorica pearls from Spain approximately 6 1/2mm;

h. Ivory bangle bracelet with 14 karat yellow gold ripple design;

i. 14 karat yellow gold loop ear rings-small loops;

j. 14 karat yellow gold loop ear rings-large loops;

2. The sum of Sixty One Thousand and no/100 Dollars ($61,000.00) in cash or cashiers check payable to MARTHA FRECH, Independent Executor of the Estate of BILLIE J. ALLARD; and

3. One-half (1/2) of the proceeds received by Contestant from General Dynamics retirement from May 1, 1983 to

April 1, 1986 (35 months x $1,007.63 x 1/2 = $17,633.53) and one-half (1/2) of the proceeds to be received by Contestant and from General Dynamics Retirement from April 1, 1986 to November 1, 1987 (20 months x $1,007.63 x 1/2 = $10,076.30) for a total sum of Twenty-Seven Thousand Seven Hundred Nine and 83/100 Dollars ($27,709.83) in cash or cashiers check payable to MARTHA FRECH, Independent Executopr of the Estate of BILLIE J. ALLARD.

It is further ORDERED that the jewelry described hereinabove shall be placed by the Independent Executor, MARTHA FRECH in a separate safe deposit box in a bank located in Fort Worth which has F.D.I.C. insurance, subject to a freeze agreement and same shall not be removed except by specific order of this Court.

It is further ORDERED that the sums of money described hereinabove in the total sum of Eighty-Eight Thousand Seven Hundred Nine and 83/100 Dollars ($88,709.83) shall be deposited by the Independent Executor, MARTHA FRECH in an interest bearing account in a bank in

Fort Worth which has F.D.I.C. insurance, subject to a freeze agreement and same shall not be removed except by specific order of this Court.

SIGNED this the 29th day of April, 1986.

/s/Robert M. Burnett
Judge Presiding

NO. 83-793-1

THE ESTATE OF	X	IN THE PROBATE
	X	
BILLIE J. ALLARD	X	COURT NO. ONE
	X	
DECEASED	X	TARRANT COUNTY,
	X	TEXAS

ORDER ON INVENTORY, APPRAISEMENT AND LIST OF CLAIMS AND OBJECTIONS TO SAME

Came on for trial BILLY J. ALLARD'S Objections to the Inventory, Appraisement, and List of Claims objecting to the Inventory, Appraisement and List of Claims filed by the Independent Executor of the Estate of BILLIE J. ALLARD, Deceased, and appeared at trial the parties with their respective counsel, and the Court finding that parties by and through their counsel having entered into a written Stipulations and Agreement as to the Inventory and Appraisement and Objections to Same, and the Court having heard the evidence and considering the argument of counsel as to the disputed property and values, it is

ORDERED, ADJUDGED and DECREED that the following property is the sole and separate property of the deceased BILLIE J. ALLARD and are owned solely by the Estate of BILLIE J. ALLARD:

1. 50 shares of Electronic Memories & Magnetic Corporation

2. Municipal Securities Trust No. 3570 MT168

3. Municipal Securities Trust No. 082-032282 Series 006

4. Central Bank & Trust account in the sum of $1,326.17

5. Tarrant Savings account in the sum of $11,918.22

6. Dallas Federal Savings account in the sum of $1,149.03

7. Gibraltar Savings account #106-0002740 in the sum of $10,000.00

8. 14 karat white gold & diamond ring with 14 karat white gold & diamond jacket ring containing one round diamond GIA Grading Scale near colorless, apprx. J in color grading, apprx. S12 clarity grading measuring apprx. 10.2mm weighing apprx. 3.75 carats

9. One jacket ring containing two brilliant-shaped diamonds weighing apprx. .30 carats total. Four baguette diamonds weighing apprx. .16 carats

total. Twelve round diamonds weighing apprx. .60 carats total.

10. 14 karat white gold & diamond ring containing one round diamond GIA Grading System apprx. K in color grading with visible natural inclusions, 12 in clarity grading weighing apprx. .75 carats.

11. 14 karat yellow gold & diamond free-form ring containing one round diamond GIA Grading System apprx. M in color with heavy visible natural inclusions weighing apprx. 1.53 carats. Three round diamonds weighing apprx. .50 carats total. Twelve round single cut melle diamonds apprx. .06 carats total.

12. 14 karat yellow gold rope chain apprx. 24" long weighing apprx. 24 dwt.

13. 14 karat yellow gold rope chain apprx. 18" long weighing apprx. 11 dwt.

14. 14 karat yellow gold rope chain apprx. 20" long weighing apprx. 12 dwt.

15. 14 karat yellow gold chain apprx. 13" long weighing apprx. 4 dwt.

16. 14 karat yellow gold rope bracelet weighing apprx. 3 dwt.

17. 14 karat yellow gold rope bracelet weighing apprx. 6 dwt.

18. 14 karat yellow gold bracelet weighing apprx. 3 dwt.

19. Imported stamped 18 karat gold bangle bracelet weighing apprx. 13 dwt.

20. Ladies 14 karat yellow gold & diamond bracelet watch containing twenty

round single cut diamonds weighing apprx. .30 carats - 17 jewel Hamilton movement. Gold weight apprx. 15 dwt.

21. One pair of 14 karat yellow gold & diamond earrings containing forty-two round full cut diamonds weighing apprx. 1.50 carats total.

22. Ladies 14 karat yellow gold & diamond ring, antique style, containing 2 round diamonds weighing apprx. .04 carats total.

23. Ladies 14 karat yellow gold cultured pearl & diamond ring containing 5 diamonds weighing apprx. .15 carats total. Ten cultured pearls each measuring apprx. as follows: 1 at 4mm, 2 at 4.5mm, 1 at 5 mm, 5 at 5.5mm, and 1 at 6mm.

24. 14 karat white gold tear-shaped pendant containing 19 round diamonds totaling apprx. .38 carats and 3 larger round stones. One weighing apprx. .05 carats, another weighing apprx. .16 carats and another weighing apprx. .33 carats.

25. Ladies 14 karat yellow gold polished mother-of-pearl ring weighing 6 dwt. & containing 1 piece of mother-of-pearl measuring 12mm long, 7.5mm wide and 2mm thick.

26. 14 karat yellow gold pendant with Mexican Cinco Peso Coin dated 1955, weighing apprx. 7 dwt.

27. 14 karat yellow gold & garnet ring containing one oval garnet apprx. 4.8mm x 3mm.

28. One pair of 14 karat yellow gold tear drop domestic Jade earrings containing two pieces of domestic green Jade measuring apprx. 21mm long and thickness measuring approx. 8mm.

29. One pair of sterling & gold overlay domestic green Jade earrings containing two pieces of oval domestic green Jade each measuring 18mm long, 13mm wide and 1.5mm in thickness.

30. One pair of 12 karat yellow gold stud earrings with drops containing a total of two oval pink pieces of coral each measuring apprx. 8mm long, 6mm wide and 3mm in thickness.

31. One pair of imitation pearl earrings

32. 14 karat yellow gold chain weighing apprx. 2 dwt.

33. One pair of 14 karat yellow gold drop earrings with a total of two tear-shaped white opals measuring apprx. 8.5mm long and 2.1mm in thickness

34. One pair of yellow metal earrings with posts and clipbacks

35. One pair of mother-of-pearl stud earrings with drops containing two round pieces of mother-of-pearl each measuring apprx. 7.3mm round and 2.8mm in thickness, and two tear-shaped mother-of-pearl drops measuring apprx. 29mm long and 5mm thick

36. Single strand tiger eye necklace with brass clasp containing 50 round tiger eye beads apprx. 7mm each

37. Single strand thought to be serpentine jade green bead necklace containing 50 round serpentine jade beads apprx. 11mm each, sterling silver clasp

38. Single strand ivory bead necklace containing 48 round ivory beads apprx. 12mm. each

39. Single strand brass and white coral necklace

40. One gold-filled oil well tie pin

41. Pair of brass & white coral earrings

42. One gold-filled rope chain

43. 14 karat yellow gold pineapple pendant weighing apprx. 5 dwt.

44. Silver frog charm

45. Gold-filled star charm

46. One 46" mother-of-pearl & simulated pearl necklace containing 76 pieces of mother-of-pearl & 114, 3.5mm simulated pearls

47. One 14 karat yellow gold bracelet with 7 charms, one 14 karat yellow gold charm weighing apprx. 5 dwt. with one 4mm cultured pearl, One 14 karat yellow gold five peso coin charm weighing apprx. 3 dwt, One 14 karat yellow gold enamel charm weighing apprx. 7 dwt & containing one round yellow topaz, one 14 karat yellow gold ruby & diamond charm containing 8 round rubies each weighing apprx. .02 carats and 3 diamonds weighing apprx. .01 1/2 each, total charm weight approx. 5 dwt., One

yellow gold overlay tree of life charm with 10 multicolored stones, One yellow gold overlay zodiac (Leo) charm.

48. One 12 karat gold-filled charm bracelet with 15 charms all of which are 1/20, 12 karat gold-filled

49. Ladies 14 karat yellow gold emerald & diamond ring containing 8 marquis-shaped emeralds each weighing apprx. .12 carats each. 18 round diamonds weighing apprx. .40 carats total, these stones being single cut.

49. (sic) Imported ladies 14 karat yellow gold & ruby ring containing 11 round rubies each weighing apprx. .06 carats totaling apprx. .66 carats total weight.

51. Imported ladies 14 karat yellow gold & white opal ring containing 8 round opals each measuring apprx. 5mm in diameter and 2mm in thickness and one single round white opal measuring apprx. 8mm in diameter and 3mm in thickness

52. 14 karat yellow gold ring weighing apprx. 5 dwt.

53. Imported ladies 14 karat yellow gold and smokey topaz ring containing one emerald-cut smokey topaz measuring 16mm in length, 12mm in width and 6.5mm deep.

54. Imported ladies 14 karat gold and brass topaz ring containing one large round topaz measuring apprx. 20mm in diameter and 14.5mm deep thickness and one single round white opal measuring approx. 8mm in diameter and 3mm in thickness

55. Ladies ivory ring with 8 strips of 14 karat yellow gold

56. Two ct. diamond in deceased's original engagement ring (husband has possession of same)

57. Ladies 14 karat white gold fashion swirl ring with 38 diamonds with center stone missing (husband has possession of same).

58. One round diamond Gemological Institute Grading applied apprx. near colorless, J in color grading with visile natural inclusions 11 grading measuring apprx. 8.5mm x 5.3mm weighting apprx. 2.35 carats. Now in husband's ring described in paragraph 7 of property awarded to husband hereinbelow.

59. 18 karat yellow gold Inca Medallion pin (in husband's possession)

60. 14 karat yellow gold ankle bracelet (in husband's possession)

61. 18" strand of small Ivory beads (in husband's possession)

62. 20" strand Majorica pearls from Spain apprx. 6 1/2mm (in husband's possession)

63. Ivory bangle bracelet with 14 karat yellow gold ripple design (matches ring which was appraised - in husband's possession)

64. 14 karat yellow gold loop ear rings (small loops - in husband's possession)

65. 14 karat yellow gold loop ear rings (large loops - in husband's possession)

66. Miscellaneous sorority pins (14 karat yellow gold with pearls, etc.)

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the following property is the sole and separate property of BILLY LOUIS ALLARD, the contestant, and are owned solely by him:

1. 14 karat white gold & diamond tie tack containing one round diamond white in color with natural inclusions weighing apprx. .25 carats

2. 14 karat white gold & diamond Shriner pin containing ten round single cut diamonds white in color with visible natural inclusions weighing apprx. .12 carats

3. One pair of 14 karat yellow gold Tiger Eye & diamond cufflinks containing two round diamonds weighing apprx. .04 carats total. Gold weight apprx. 8 dwt.

4. Man's 18 karat yellow gold bracelet weighing apprx. 29 dwt.

5. One 14 karat yellow gold rope necklace 14" long with yellow gold pendant, Aries design. One 14 karat gold rope necklace apprx. 16" long with 18 karat yellow bezel containing a 24 karat Mexican $10 coin.

6. Man's 14 karat yellow gold & diamond bracelet watch with Omega movement containing forty-seven diamonds weighing apprx. 1.00 carats total. Gold weight apprx. 25 dwt.

7. Man's 14 karat yellow gold nugget ring, SAVE AND EXCEPT the 2.35 carat stone (near colorless, J in color grading with visible natural inclusions 1/1 grading measuring apprx. 8.5mm x 5.3mm) which has previously been awarded to the deceased BILLIE J. ALLARD as her sole and separate property.

8. Man's 14 karat yellow gold & diamond ring containing one round diamond Geological Institute Grading apprx. near colorless, apprx. 1 color grading with visible natural inclusions, 1s clarity grading, measuring apprx. 4.2mm x. 2.4mm weighing apprx. .32 carats.

9. Man's 14 karat yellow gold & Mexican Dos Peso ring weighing apprx. 8 dwt.

10. Man's 14 karat yellow gold & diamond Shriner ring containing one round diamond GIA Grading System apprx. near colorless, apprx. J color grading with visible natural inclusions, 1/2 clarity grading measuring apprx. 7.1mm x 4.1mm weighing apprx. 1.27 carats; Twelve full cut melle diamonds white in color with natural inclusions weighing apprx. .20 carats total.

11. Man's 14 karat yellow gold ring (1 1/2 ct.)

12. Man's 14 karat yellow gold round Omega Calendar watch

13. Opera binoculars

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the following property was

the community property of the deceased BILLIE J. ALLARD and BILLY LOUIS ALLARD, and as such the Estate is entitled to a one-half (1/2 interest in same, and that the value of each as of the date of death was as follows:

1. LOT 32R, BLOCK 8, Overton West Addition to the City of Fort Worth, Texas.

2. Northwest National Bank account, $8,039.53

3. First Texas Savings account, $143.22

4. University Bank account, $2,201.90

5. Dallas Federal account #547699-14, $3,971.31

6. Carswell Federal Credit Union, $1,258.45

7. TAB/FW account, $3,057.36

8. Gibraltar CD #106 0081195 in original principal sum of 75,762.00 with interest at 14.80%, $75,762.00

9. 1979 Mark V automobile, $7,850.00

10. General Dynamica Retirement, $102,080.00

11. Accounting practice, $6,000.00

12. Office equipment, $600.00

The Court further finding that BILLY LOUIS ALLARD sold community real property described as LOT 16R, BLOCK 14, Meadowbrook Hills Addition to the City of Fort Worth, Texas immediately prior to the death of BILLIE J. ALLARD for the sum of Fifteen Thousand Six Hundred Eighty-Nine and 14/100 Dollars ($15,689.14), it is

ORDERED, ADJUDGED and DECREED that the sale proceeds of Fifteen Thousand Six Hundred Eighty-Nine and 14/100 Dollars ($15,689.14) were community funds of the deceased BILLIE J. ALLARD and BILLY LOUIS ALLARD, and the Estate of BILLIE J. ALLARD, deceased is the owner of one-half (1/2) of said funds.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Estate of BILLIE J. ALLARD is obligated for the funeral expenses of BILLIE J. ALLARD in the sum of Four Thousand Five Hundred Ninety-Six and NO/100 Dollars ($4,596.00).

IT IS FURTHER ORDERED that all sums of money awarded to either party shall bear interest at the legal rate of interest or the contracted rate of interest whichever is greater, from date of death to date same are paid.

IT IS FURTHER ORDERED that one-half (1/2) of the interest that accrued but was unpaid prior to date of death of BILLIE J. ALLARD on the Tarrant Savings and Dallas Federal Savings account is community property and the contestant BILLY LOUIS ALLARD is entitled to one-half (1/2) of same.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all objections of BILLY LOUIS ALLARD contained in his Objections to Inventory, Appraisement and List of Claims are expressly overruled except as sustained by the Court hereinabove.

SIGNED the 13th day of March, 1986.

/s/ Robert M. Burnett
Judge Presiding

NUMBER 83-793-1

THE ESTATE OF	X	IN THE PROBATE COURT
	X	
BILLIE J. ALLARD	X	NUMBER ONE OF
	X	
DECEASED	X	TARRANT COUNTY,
	X	TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury on May 29-30, 1985, and July 23-24, 1985. All parties and their attorneys were present. After considering the pleadings, the evidence, the argument and briefs from counsel, the Court, in response to a request from the attorney for contestant, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The Estate of BILLIE J. ALLARD, deceased, filed its Inventory, Appraisement and List of Claims on June 20, 1984.

2. The surviving husband Bill L. Allard, Contestant, filed his written

Objections to Inventory, Appraisement and List of Claims.

3. The Estate and the Contestant by and through their attorneys entered into a written stipulations and agreements as to the Inventory, Appraisement and Objections to same, which was filed and approved by this Court.

4. The Stipulations and Agreements as to the Inventory and Appraisement and Objections to same narrowed the disputed issues to be tried by the Court to the issue of characterization and valuation of property owned by Deceased and Contestant.

5. At the date of death of Deceased, she and Contestant had a joint account at First Texas Savings which had a balance of $143.22.

6. The parties account at First Texas Savings was subject to a written

agreement, but the agreement did not effect a partition.

7. At the date of death of Deceased, she and Contestant had a joint account at Carswell Federal Credit Union which had a balance of $1,258.45.

8. The parties account at Carswell Federal Credit Union was subject to a written agreement, but the agreement did not effect a partition.

9. At the date of death of Deceased, she and Contestant had a joint account at TAB/Fort Worth which had a balance of $3,057.36.

10. The parties account at TAB/Fort Worth was subject to a written agreement, but the agreement did not effect a partition.

11. At her death, the Deceased and Contestant were owners of Gibralter Savings Certificate of Deposit #106 0081195 in the principal sum of $75,762.00.

12. The source of funds used to purchase the Gibralter Savings Certificate of Deposit came from funds earned by the parties during marriage.

13. The parties Certificate of Deposit at Gibralter Savings was subject to a written agreement, but the agreement did not effect a partition.

14. Contestant testified that there was never any partition of property or assets between he and his wife.

15. Contestant testified that no gift was made or intended between he and his wife.

16. The fifty (50) shares of Electronic Memories & Magnetic Corporation were inherited by the Deceased from her mother.

17. Municipal Securities Trust #3570 MT 168 Certificate was purchased with proceeds from the sale of a farm

inherited by the Deceased from her mother.

18. Municipal Securities Trust #082-032282 Certificate was purchased with proceeds from the sale of a farm inherited by the Deceased from her mother.

19. The funds on deposit in Central Bank & Trust account #162 4667 in the sum of $1,326.17 in the name of Minnie C. Parten (the deceased's mother) were funds received from Deceased's mother's estate.

20. The principal balance on deposit in Tarrant Savings account #7-12169701 in the sum of $11,918.22 were funds given to the Deceased by her mother.

21. The principal balance on deposit in Dallas Federal Savings account number 393968-69-11-3 in the sum of $1,149.03 were funds given to the Deceased by her mother.

22. The funds on deposit in Gibralter Savings account in the sum of $10,000.00 were funds of the Deceased.

23. The two carat diamond in Contestant's ring was given by Contestant to his wife as a reconciliation gift, and later removed by Contestant and placed in his own ring.

24. There was no testimony that the Deceased gave the two carat stone to Contestant.

25. During the entire time Contestant was employed at General Dynamics he was married to Deceased.

26. At the time of Deceased's death Contestant had retired from General Dynamics and was receiving monthly benefits.

27. At the time of death of Deceased, the retirement had a present value of $102,080.00.

28. There was no written agreement signed by employer and employee concerning General Dynamics Retirement Benefits.

29. There was no written instrument or document signed by the Deceased designating the disposal by her of the interest in General Dynamics retirement.

30. At the date of death of Deceased all of the General Dynamic retirement benefits had vested.

31. Contestant stated that if he predeceased his wife, that she would receive the General Dynamics Retirement Benefits.

32. At the date of death of Deceased, she and contestant had a joint account at Northwest National Bank which had a balance of $8,039.53.

33. At the date of death of Deceased, she and contestant had a joint

account at University Bank which had a balance of $2,201.90.

34. At the date of death of Deceased, she and contestant had a joint account at Dallas Federal in account no. 547699-14 which had a balance of $3,971.31.

35. At the date of death of Deceased, she and contestant had a joint account at Carswell Federal Credit Union which had a balance of $1,258.45.

36. At the date of death of Deceased, she and contestant had a joint account at TAB/Fort Worth which had a balance of $3,057.36.

37. Contestant stated that if he and his wife were divorced, she would have been entitled to a portion of the General Dynamics retirement.

38. At the death of Decedent, she and Contestant owned household furnishings which were insured by Contestant at a replacement value of

$66,180.00 which the Court valued at $11,189.45.

39. At the death of Decedent, she and Contestant owned a 1979 Mark V automobile which the Court found to have a fair market value of $7,850.00.

40. At the death of Decedent, Contestant was self-employed on a full time basis as an accountant, and the value of his accounting practice was $6,000.00.

41. At the death of Decedent, she and Contestant owned office equipment which had a value of $600.00.

42. At the death of Decedent she and Contestant owned improved real property described as Lot 32R, Block 8, Overton West addition to the City of Fort Worth, Texas.

43. Prior to March 30, 1983, but during his marriage to deceased, Contestant acquired Lot 16, Block 14, Meadowbrook Hills Addition.

44. On March 30, 1983 Contestant sold Lot 16, Block 14, Meadowbrook Hills Addition for a profit of $15,689.14.

45. The Court finds that the stipulations and agreements contained in the written Stipulations and Agreements as to the Inventory, Appraisement and Objections to Same are additionally designated as findings of fact by the Court.

CONCLUSIONS OF LAW

1. The stipulations and agreements contained in Stipulations and Agreements as to the Inventory and Appraisement and Objections to Same are additionally designated as conclusions of law by the Court.

2. The residence at 3804 Summercrest, Fort Worth, Texas, was the community property of the Deceased and Contestant, and the Estate has a one-half (1/2) interest in same.

3. The accounts at Northwest National Bank in the sum of $8,039.53, University Bank in the sum of $2,201.90, First Texas Savings account in the sum of $143.22, and Dallas Federal Savings #547699-14 in the sum of $3,971.31 were the community property of the Deceased and Contestant, and the Estate has a one-half (1/2) interest in same.

4. The accounts at First Texas Savings in the sum of $143.22, Carswell Federal Credit Union in the sum of $1,258.45, TAB/Fort Worth in the sum of $3,057.36, Gibralter Savings C.D. #106-0081195 in the principal sum of $75,762.00 were jointly owned by the Deceased and Contestant, and the Estate has a one-half (1/2) interest in same.

5. The accounts described in paragraph 3 and 4 hereinabove were not subject to any partition agreement, or spousal gift.

6. The accounts described in paragraph 3 and 4 hereinabove were not valid joint accounts with right of survivorship.

7. The jewelry described in items A. 1 through A. 59 of the Inventory and Appraisement was the separate property of the Deceased and is owned solely by the Estate.

8. The items described in B. 1 through B. 12 of the Inventory and Appraisement are the separate property of the Contestant, and are owned solely by him.

9. The furnishings, furniture and contents of the residence at 3804 Summercrest, Fort worth, Texas were the community property of the Deceased and Contestant, and the Estate has an one-half (1/2) interest in same.

10. The 1979 Mark V automobile was the community property of the Deceased

and Contestant, and the Estate has a one-half (1/2) interest in same.

11. The accounting practice of Contestant was the community property of the Deceased and Contestant, and the Estate has a one-half (1/2) interest in same.

12. The office equipment and furnishings were the community property of the Deceased and Contestant, and the Estate has a one-half (1/2) interest in same.

13. The General Dynamics retirement was a vested community asset at date of death of deceased.

14. There was no partition or disposition by the Deceased or the Contestant of any portion of the General Dynamics retirement.

15. Municipal Securities Trust No. 3570 MT 168 was the separate property of the Deceased, and the Estate is the sole owner of same.

16. Municipal Securities Trust No. 082-32282 was the separate property of the Deceased, and the Estate is the sole owner of same.

17. The account balance in Central Bank & Trust account No. 162 466 7 in the sum of $1,326.17 consisted solely of separate property funds belonging to the Deceased, and the Estate is the sole owner of same.

18. The account balance in Tarrant Savings account No. 7-12169701 in the sum of $11,918.22 consisted solely of separate property funds belonging to the Deceased, and the Estate is the sole owner of same.

19. The account balance in Dallas Federal Savings account No. 393968-69-11-3 in the sum of $1,149.03 consisted solely of separate property funds belonging to the Deceased, and the Estate is the sole owner of same.

20. The fifty (50) shares of Electronic Memories and Magnetic Corporation was the separate property of the Deceased, and the Estate is the sole owner of same.

21. The Gibralter Savings account #106-0002740 was Deceased's separate property, and the Estate is the sole owner of same.

22. The two carat diamond previously in Deceased's engagement ring was a gift to the Deceased and was her separate property. The Estate is the sole owner of same.

23. The 2.35 carat diamond was a gift by Contestant to Deceased and was her separate property. The Estate is the sole owner of same.

SIGNED this the 29th day of April, 1986.

/s/ Robert M. Burnett
Judge Presiding

NO. 2-86-074-CV

IN THE COURT OF APPEALS FOR THE

FOR THE SECOND APPELLATE DISTRICT

OF TEXAS

Billy L. Allard	)	From the Probate
	)	Court No. 1
	)	
	)	of Tarrant
	)	County (83-793-1)
	)	
vs.	)	August 5, 1987
	)	
Martha Parten Frech,	)	Opinion by
Independent Executrix	)	Justice Joe
of The Estate of	)	Spurlock II
Billie J. Allard,	)	
Deceased	)	(P)

JUDGMENT

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was error in part of the judgment of the trial court. It is therefore ordered, adjudged and decreed that this cause is reversed and remanded for the trial court to make disposition of the funds we have found to be mischaracterized,

and for adjustment as otherwise needed in its orders. The remainder of the judgment is affirmed.

It further ordered that appellant, Billy L. Allard, and his surety, Lawyers Surety Corporation, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

/s/ Joe Spurlock II

NO. 2-86-074-CV

IN THE COURT OF APPEALS FOR THE

FOR THE SECOND APPELLATE DISTRICT

OF TEXAS

Billy L. Allard	)	Appellant
	)	
vs.	)	
	)	
Martha Parten Frech, Independent Executrix of The Estate of Billie J. Allard, Deceased	)	Appellee

FROM THE PROBATE COURT NO. 1 OF TARRANT COUNTY

OPINION

Appellant, Billy L. Allard, appeals from two orders issued in connection with the probate of the estate of his deceased wife Billie J. Allard. An approval order was entered by the court after a trial on the inventory, appraisal and list of claims filed by Martha Parten Frech, executrix. A

second order was later issued to compel compliance with the approval order.

We affirm in part and reverse and remand in part.

Billie J. Allard and Billy L. Allard were married in 1945. During their marriage, Mr. Allard began working for General Dynamics Corp., retiring in May, 1982. Mrs. Allard died on April 11, 1983, after a long bout with cancer. The couple was married until Mrs. Allard's death. Martha Parten Frech, Mrs. Allard's sister, offered a will dated January 12, 1983 into probate. Allard contested the will and offered a later will, dated March 22, 1983. The later will was rejected by the court. When the will offered by Mrs. Frech was admitted to probate, as independent executrix she filed an "Inventory, Appraisement, and List of Claims" to which Allard objected. At trial, the issues were limited by agreement to

those concerning the characterization of certain property. The court approved the inventory, signed the approval order, and later entered the second order to compel delivery of property in compliance with the approval order. Points of error one through thirteen challenge the approval order. Points of error fourteen through sixteen challenge the second order.

In point of error one, Allard contends the court erred in finding that his General Dynamics retirement plan was community property, one-half of which the court included in Mrs. Allard's estate. The retirement plan had a value of $102,080.00 and vested in 1982. As a result of the community characterization, Mrs. Allard's one-half of the retirement plan passes to two trusts set up in favor of the Allards' daughter and grandchildren. Allard claims these beneficiaries were never

intended to be protected by or share in his retirement plan because they are able-bodied young adults capable of supporting themselves. We are in sympathy with the position taken by appellant and agree that adult children should not share in the retirement of a parent. Nevertheless, we must reject this argument.

In support of his argument, Allard asks this court to apply the result of Valdez V. Ramirez, 574 S. W. 2d 748 (Tex. 1978) to this case, or to adopt for Texas a probate rule called the terminable interest rule. In Valdez the Court held the employee-wife's retirement benefits remaining after her husband's death were her separate property because as a federal government employee, her retirement was provided by the Civil Service Retirement Act, 5 U.S.C. sec. 8331 (Supp. VIII 1987), et seq., which pre-empts conflicting state

marital property rules. Valdez, 574 S.W.2d at 751; see also Ex parte Burson, 615 S.W.2d 192, 193-94 (Tex. 1981).

The terminable interest rule answers that question of whether or note to disburse retirement benefits to heirs of the deceased spouse by terminating the non-employee spouse's interest in a pension at the death of either spouse. Waite V. Waite, 6 Cal. 3rd 461, 99 Cal. Rptr. 325, 492 P.2d 13 (1972); Matter of Estate of Allen, 108 Cal. App. 3rd 614, 166 Cal. Rptr. 653 (Court of Appeals [1st Dist.] 1980). Both of these rules offer an equitable solution to the dilemma of whether or not to pay one-half of a person's retirement to devisees or heirs of the deceased spouse's interest in the community estate. These persons otherwise would not, and should not, have an interest in a survivor's hard earned and needed retirement benefits. In this

connection, we are not speaking of a plan which provides some sort of specific death benefit, but rather the type which when put into effect, was contemplated to provide minimum subsistence for the retired employee or spouse for the remainder of their natural lives, or a stated period of time.

Allard acknowledges that a spouse has a community property interest (while alive) in that portion of the retirement benefits of the earning spouse accruing during their marriage. He argues that certain comments by our Supreme Court in Valdez, 574 S.W.2d at 748 coupled with legitimate public policy considerations, dictate that Texas should adopt the terminable interest rule. That rule asserts the non-employee spouse's pension interest terminates at the death of either spouse, hence, is not subject to testamentary disposition. See Waite,

6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P.2d 13. In essence Allard is arguing that while the community property interest may be determined and divided upon dissolution of the marriage while both spouses are alive, dissolution by death should effect another result.

In Valdez, a United States Civil Service employee had been receiving retirement benefits for two years when her husband died intestate. He had been married to the retired employee for 340 months of the 352 months of here employment. The issue was whether the deceased husband's interest in his wife's civil service retirement benefits was inheritable by his adult children of a former wife.

The Supreme Court held that the retired employee succeeded to the survivor portion of the annuity benefit, consequently none of the benefit could pass by the intestacy of her husband.

The decision was not based upon Texas law but upon the requirements of the federal Civil Service Act, which provides only for payment to the employee, or in the case of the employee's death, to the surviving spouse and to the employee's minor, incapacitated or student children. The Court found that "[I]t would be contrary to the whole contract, policy, and plan of the Retirement Act for nearly one-half of Mrs. Valdez's monthly payments to be taken from her and awarded to her deceased husband's adult children." Valdez, 574 S.W.2d at 750. Allard argues the same equitable result should obtain here.

The Valdez court noted that a recognized non-probate asset, not subject to disposition by will or intestate distribution, is property passing by right of joint survivorship. Id. at 750. Allard argues this also is

authority for his position as his retirement is a non-probate asset. However, in Valdez, the court pointed out that the employee had exercised the joint and survivorship option provided by her retirement plan. Although this option provided a lower monthly payment to her and her husband while both were living, and a lower payment to her if she survived him, it also created in the husband a right to an annuity if he survived her. Id. at 751. The annuity, being a valid joint survivorship community asset, was therefore a non-probate asset to which either was entitled to full enjoyment upon the death of the other. Id.

In the retirement plan before us there is a joint survivor option but that option was not exercised by Allard, whose plan is to pay benefits during his entire lifetime with ten years of benefits guaranteed to him or someone

else. Consequently, the holding and result in Valdez may be distinguished here.

Another reason to distinguish the instant case from Valdez is the source of the retirement plan. On motion for rehearing in Valdez the Court very carefully noted that "we are dealing here with a type of joint and survivorship annuity which was created by federal law." Id. at 753. The Court further specifically held: "[A] joint survivorship annuity clearly authorized by federal law to serve a federal purpose may preempt conflicting state laws in the absence of its use to perpetuate a fraud by one spouse on the other." Id.

What is most troublesome is that, having noted on p. 750 that property passing at the death pursuant to terms of a contract, such as provided in life insurance policies and under

contributory retirement plans is one of "four categories of assets known as non-probate assets, not subject to disposition by will and not subject to the rules of intestate distribution," Justice Daniel, writing for the Court, did not use this as a basis for the decision in Valdez, and never otherwise remarked on this rule in the opinion. This rule was not the basis for the holding in Valdez. Specifically, on rehearing, Justice Daniel seemed to be making very clear that except for the fact that the Valdez retirement was federal, there might be "conflicting state laws" governing the disposition of a joint (community) interest in retirement. Therefore, we do not find Valdez to be authority in this case to hold the community interest of Mrs. Allard terminated on her death, as was the result reached in Valdez.

The Supreme Court had a clear opportunity in Valdez to adopt the terminable interest rule, or use an exclusionary rule of defining the entire retirement interest as a non-probate asset, but did not do so. The Court very carefully based the entire decision on federal law. The footnote cases by Justice Daniel used as authority in discussing the non-probate category of assets do not support Allard's position either. Id. at 750 n. 3.

It would be interesting to know what arguments or discussions occurred in the Supreme Court while the motion for rehearing was pending in Valdez, but all we do know is that, having mentioned contributory-retirement at one place as a non-probate (excluded) asset in the main body of the opinion, the court never again discussed this characteristic of the property. Obviously if the Supreme Court were to

adopt either an exclusionary rule or terminable interest rule for non-federal retirement plans, many other facets of the law governing the descent and distribution of community property would have to be taken into account. Nor may this intermediate appellate court engraft the "terminable interest" rule upon Texas Law. That matter is one for the legislature or the Supreme Court. We are impressed by the reasoning of the Washington Supreme Court in declining to adopt the rule in Farver v. Dept. of Retirement Systems, 644 P.2d 1149, 1151-52 (Wash. 1982) (en banc). We find the trial court did not err in determining the retirement pay was community property. We overrule point of error number one.

The second and third points of error challenge the legal and factual sufficiency of the evidence to support the court's finding that one-half of the

sums on deposit in a bank account having a notation of a joint tenancy with right of survivorship was the property of the estate. In its findings of fact, the court determined that the bank account was subject to a written agreement, but the agreement did not effect a partition. The court further concluded that the bank account was not subject to any partition agreement or spousal gift, and was not a valid joint account with right of survivorship. The trial court refused to find that the parties intended the account to be a joint tenancy with right of survivorship. It is undisputed that the bank account was funded with community property.

Allard contends the bank account was a joint tenancy with right of survivorship authorized by the Texas Constitution and the Texas Probate Code. Since 1948, the Texas Constitution has permitted spouses to partition existing

community property. In 1980 the Constitution was amended to allow spouses to partition property not yet acquired:

> [P]rovided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse.

TEX. CONST. art. XVI sec. 15

Implementing legislation to this portion of the Constitution is found in both the family and the probate codes. The Family Code defines the formalities of a partition agreement: "each agreement, partition, or exchange agreement made under this subchapter must be in writing and subscribed by all parties."

TEX. FAM. CODE ANN. sub. 5 sec. 44 (Vernon Supp. 1987). The Probate Code abolishes joint tenancies yet purports to allow spouses to create a joint tenancy with the right of survivorship in bank accounts:

> 46 Joint Tenancies Abolished
>
> (a) Where two (2) or more persons hold an estate, real, personal, or mixed, jointly, and one (1) joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. Provided, however, that by an agreement in writing of joint owners of property the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.
>
> (b) A written agreement between spouses and a bank, savings and loan, credit union, or other financial institution may provide that existing funds or securities on deposit and funds and securities to be deposited in the future and interest and income thereon shall

> by that agreement be partitioned into separate property and may further provide that the property partitioned by that agreement be held in joint tenancies and pass by right of survivorship.

TEX. PROB. CODE ANN. sec. 46 (Vernon Supp. 1987). (Emphasis added.)

Relying on section 46(b) of the Probate Code, Allard takes the position that the survivorship language on the signature card manifests a clear intention to partition the property, even though there is no partition language on the signature card. In holding this view, Allard defies a firmly rooted principle of community property law in Texas which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created. See Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981); Williams v. McKnight, 402 S.W.2d 505, 507 (Tex. 1966); Hilley

v. Hilley, 161 Tex. 569, 342 S.W.2d 565, 569, 1961.

Although Maples v. Nimitz was decided prior to the 1980 Constitutional Amendment, and did not involve section 46(b) of the Probate Code, we believe the holding of that case is dispositive of this appeal. In Maples the issue before the Supreme Court of Texas was whether the bank signature card signed by Mr. and Mrs. Maples purporting to create a joint tenancy with right of survivorship constituted a partition of the community funds. Id. 615 S.W.2d at 693-94. The statute which authorized such an account concerned savings and loan associations and was framed in terms of partition:

> Joint accounts by husband and wife
>
> Sec. 6.09. A husband and wife shall have full power to enter into a savings contract involving a savings account consisting of funds which are community property of their marriage so as to create a joint tenancy with right of

> survivorship as to such account and any future additions or dividends made or credited thereto and, to the extent necessary to accomplish such result in law, such contract shall constitute a partition of such community property or reciprocal gifts from the respective spouses, if the same is in writing and subscribed to by such husband and wife even though not acknowledged by either of them.

TEX. REV. CIV. STAT. ANN. art. 852a sec. 6.09 (Vernon 1964). (Emphasis added.)

The Supreme Court of Texas nevertheless held the savings contract language to be ineffective and a fictional partition. The Supreme Court noted that the mere execution of the signature agreement providing for a joint tenancy with right of survivorship did not effect a one-step partition of community funds sufficient to meet the requirements of the Constitution:

> [A] partition of community funds must be accomplished by the spouses before creation of the joint tenancy with right of survivorship.

Maples, 615 S.W.2d at 695.

We likewise find the partition to be fictional in this case. The agreement executed by Mr. and Mrs. Allard makes no reference to a partition of community funds, and the record contains no partition agreement independent of the signature card. We further find that a partition was not implicit in the agreement merely because the language of 46(b) may allow the partition of community funds and creation of a joint tenancy with the right of survivorship in one transaction. See Id.; Williams v. McKnight, 402 S.W.2d at 508. Cf. Jameson v. Bain, 693 S.W.2d 676, 679 (Tex. App.--San Antonio 1985, no writ)(partition not effected when testimony showed the joint tenancy agreement was signed before the partition agreement was signed.)

A similar partition by implication argument was rejected by the Corpus Christi Court of Appeals in Bradley v.

Bradley, 725 S.W.2d 503, 504 (Tex. App.--Corpus Christi 1987, no writ). In that case, the parties signed a prenuptial agreement expressing their intent to preserve the separate property character of the personal efforts, including income. However, the parties failed to execute annual partition agreements. The court held "the prenuptial agreement itself does not operate to partition and exchange the community property interest. . . . it merely contemplates a partition and exchange of community property interests in the future." Id. We hold that a partition of community funds in Texas is not implicit in the mere execution of a joint tenancy with right of survivorship agreement, and that actual partition of community funds must be accomplished in an active not passive manner. The court did not err in determining the funds in the account were community property, with no right

of survivorship in Mr. Allard. Points of error two and three are overruled.

In points of error four through thirteen, Allard challenges the legal and factual sufficiency of the evidence to support the trial court's findings and conclusions of the separate property character of certain funds in accounts. Under the facts of this case, Mrs. Frech carried the burden of persuading the trial court that the character of the property of the decedent's estate was accurately reflected in the "Inventory, Appraisement and List of Claims." See Wohlenberg v Wohlenberg, 485 S.W.2d 342, 348 (Tex. Civ.App.--El Paso 1972, no writ). Although the inventory is not conclusive of the title to the property therein listed, it is prima facie evidence of that fact. Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48, 50 (1962); Balaban v. Balaban, 712 S.W.2d 775, 779 (Tex.App.--Houston [1st

Dist.] 1986, writ ref'd n.r.e.); Adams v. Sadler, 696 S.W.2d 690, 692 (Tex. App.--Austin, 1985, writ ref'd n.r.e.).

Among the items listed on the inventory as the decedent's separate property were a municipal securities trust 082-032282 series 006 valued at $10,000, and bank accounts at Tarrant Savings Association valued at $11,918.22. Listed as a community asset was a Gibralter Savings Account valued at $10,000. The trial court found all three assets to be the separate property of the estate.

At this juncture we note that part of this appeal seems to stem from discrepancies between the labels given to the assets on the inventory, on the exhibits tracing the assets, and in the court's final order. However, after careful review of the record, we believe these discrepancies do not hinder our ability to accurately respond to the

points of error. The inventory listed "Tarrant Savings, $11,918" as separate property of the estate. The court found "[t]he principal balance on deposit in Tarrant Savings account number #7-12169701 in the sum of $11,918.22 were funds given to the Deceased by her mother." It appears that part of Allard's complaint is that Mrs. Frech did not adequately trace the source of funds underlying the balance of $11,918.22. We disagree.

Mrs. Frech testified the $11,918.22 was an amalgamation of three different certificates of deposits which were gifts to the decedent from her mother. No evidence shows an account numbered 7-12169701. However one of the three accounts making up the $11,918.22 was numbered 12-16970-1. Each of the three different accounts was represented by an exhibit, detailing the history of the account, and was included on a summary

of the decedent's property obtained by gift or devise from her mother. All of these exhibits were admitted into evidence. One of the exhibits showed a bank account with a number 12-16970-1. Mrs. Frech testified that their mother was very meticulous about making sure both daughters received the same amount of money in terms of gifts, and any time she made a gift to one daughter, she made a gift of equal value to the other. Mrs. Frech also testified their mother, prior to her death, made some monetary gifts to Mrs. Frech and the decedent. Among these gifts were three certificates of deposits in amounts approximating $8,043, $2,049 and $1,400. No evidence was presented at trial to suggest the accounts were comingled with community funds, so as to destroy their separate character. The total of these deposits is $11,492.

Although Allard testified that only one of the accounts was a gift to the decedent from her mother, he also testified that the transactions with respect to the other two accounts were accurately recorded in the exhibits produced by Mrs. Frech's attorney. He testified his name appeared at one time on the accounts as a co-owner, but at trial, the accounts did not carry that notice. Allard could not say what happened to the accounts. We find the evidence produced by Mrs. Frech was both legally and factually sufficient to support the court's finding that the balance of the Tarrant Savings account were the separate property of the estate (being an amalgamation of the three different deposits), regardless of the conflict between the inventory, the evidence, and the language of the court's finding.

Allard also challenges the court's findings that municipal securities trust number 082-032282 certificate was purchased with proceeds from the sale of a farm inherited by the deceased from her mother. This item was listed on the inventory as decedent's separate property with a value of $10,000. There is no indication that Mrs. Frech or anyone else was attempting to show the gift was from the sale of a farm, notwithstanding the court's finding to the contrary. The evidence Mrs. Frech produced adequately traces the securities to a gift from the decedent's mother. The record is clear, that another, second group of securities was purchased with proceeds inherited by the decedent from the sale of her mother's farm. That finding is not challenged on appeal.

Mr. Allard nevertheless testified that the securities in certificate #082-

032282 were purchased from other, different C.D.'s. Mrs. Frech's exhibits to support the separate character of the securities show that a C. D. owned by the decedent's mother was divided equally in 1974 between her two daughters, giving them $10,000 each. The decedent had opened a C. D. naming her own daughter as survivor. Eventually that C. D. was closed and the principal deposited into a checking account at Central Bank and Trust. A check for $10,128.90 was written on the Central account to Rotan Mosle for the purchase of the securities. We find the evidence presented by Mrs. Frech is both legally and factually sufficient to support the court's finding that the certificate was separate property. The language in the court's finding that the securities were bought from the proceeds of the sale of the decedent's mother's farm does not abrogate the finding.

Points of error four, five, six, seven, twelve and thirteen are therefore overruled.

Finally, Allard challenges the court's finding that $10,000 on deposit in a Gibralter Savings account was the separate property of the decedent. Mrs. Frech listed this account as community property in the inventory, and did not attempt to characterize it otherwise at trial. Allard objected that the account did not exist, and in the alternative that the $10,000 was combined with other funds to form the Gibralter Savings account discussed in points of error two and three. There is no evidence to support the court's finding that the account was the decedent's separate property. The trial court should have either found that the account did not exist, or that it was the community property of both parties. The trial court committed error in finding the

funds were separate property of the decedent. Points of error eight through eleven are sustained.

In his final points of error, Allard challenges the second order entered by the trial court. After the court's order de4determining ownership of the various assets, Allard refused to deliver certain separate property of the estate to Mrs. Frech. Mrs. Frech filed a "Motion to Compel Delivery of Property" and after hearing, the court entered an order requiring Allard to delver to the court ten specifically described rings and other pieces of jewelry together with the following:

> 2. The sum of sixty One Thousand and no/100 Dollars ($61,000.00) in cash or cashiers check payable to MARTHA FRECH, Independent Executor of the Estate of BILLIE J. ALLARD; and
>
> 3. One-half (1/2) of the proceeds received by Contestant from General Dynamics retirement from May 1, 1983 to April 1, 1986 (35 months x $1,007.63 x 1/2 = $17,633.53) and one-half (1/2) of the proceeds to

> be received by Contestant and from General Dynamics Retirement from April 1, 1986 to November 1, 1987 (20 months x $1,007.63 x 1/2 = $10,076.30) for a total sum of Twenty-Seven Thousand Seven Hundred Nine and 83/100 Dollars ($27,709.83) in cash or cashiers check payable to MARTHA FRECH, Independent Executor of the Estate of BILLIE J. ALLARD.

The jewelry was to be deposited in a safe deposit box and the money was to be deposited in an interest bearing account, all subject to freeze agreements subject to further court order.

Allard contends in point of error fourteen that the second order was a "turnover order" erroneously granted because no attempt was made to obtain the property by formal writ of execution, as required by the Turnover Statute, TEX. CIV. PRAC. & REM. CODE sec. 31.002 (Vernon 1986). Mrs. Frech contends, and we agree, that the order is not a turnover order but is instead an exercise of the court's authority to enforce its orders to insure

preservation of the property, even cash. See TEX. R. CIV. P. 308.

The purpose of a turnover order is to aid a diligent judgment creditor in satisfying a judgment in a timely manner. Schliemann v Garcia, 685 S.W.2d 690, 692 (Tex.App.--San Antonio 1984, no writ); 45 Tex. B.J. 417 (1982). The statute is clearly for the benefit of judgment creditors. See Schliemann, 685 S.W.2d at 692. We do not need to decide in this case whether it should or could be extended to probate matters.

Additionally, in points of error fifteen and sixteen, Allard complains of that portion of the second order compelling him to pay $88,709.83 in cash by two checks representing funds due the estate which the court found were in Allard's possession or at one time under his control. Sixty-one Thousand dollars represented funds from a source which cannot be determined from the order

alone. The remaining amount was made up of $17,633.53 due to the estate from one-half of the retirement paid and $10,076.30 to be paid in the future to Allard. Allard complains, without citing authority, that the court exceeded its authority to order cash paid over without describing the specific bank account chargeable, or without other specific rule or statutory authority. We disagree. It is sufficient that the court had found funds due the estate, and that the evidence shows they were at one time under Allard's control.

We hold the court has inherent power to enforce its judgments, without resort to the Turnover Statute. Reynolds v. Harrison, 635 S.W. 2d 845, 846 (Tex.App.--Tyler 1982, writ ref'd n.r.e.). See Various Opportunities v. Sullivan Investments, Inc., 677 S.W.2d 115, 118 (Tex.App.--Dallas 1984, no

writ). However, so much of the order as required Allard to pay a lump sum certain before it was due was excessive. The court may order Allard to pay such sums if, as and when they become due. Without joinder of the manager of the retirement fund, Allard remains at best as constructive trustee of the funds owing to the heirs. Points of error fourteen, fifteen and sixteen are therefore overruled.

This cause is reversed and remanded for the trial court to make disposition of the funds we have found to be mischaracterized, and for adjustment as otherwise needed in its orders. The costs are assessed against appellant.

/s/ Joe Spurlock II
JUSTICE

NO. C-6863

IN THE SUPREME COURT OF TEXAS

BILLY L. ALLARD,

Petitioner

vs.

MARTHA PARTEN FRECH,
Independent Executrix of the
Estate of Billie J. Allard,
Deceased,

Respondent

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT
OF TEXAS:

COMES NOW Billy Louis Allard, Petitioner, and files this Motion for Rehearing in the above-entitled and referenced cause, and as grounds therefore would show unto this Honorable Supreme Court as follows:

POINT OF ERROR

The Honorable Texas Supreme Court of Texas erred in holding that one-half of the retirement plam of Petitioner was community property, one-half of which

was properly included in the estate of Billy L. Allard.

ARGUMENT AND AUTHORITIES

The majority of this Honorable Court erred in holding that one-half of decedent's retirement benefits should pass to the heirs of Respondent because (1) Valdez v. Ramirez, 574 S.W.2d 748 (Tex. 1978) should control the result, (2) Probate Cd. sec. 450(a)(1) was misconstrued in the opinion, (3) the majority's result is not supported by public policy or legislative intent, (4) the majority opinion as written conflicts with and is pre-empted by ERISA, and (5) the opinion as written could have disastrous tax consequence under the Internal Revenue Code for the people of the State of Texas.

I. VALDEZ V. RAMIREZ SHOULD CONTROL

It is respectfully submitted that the majority's distinguishing of Valdez v. Ramirez, 574 S.W.2d 748 is

inapposite, and that the Court's insistence in giving one half of Petitioner's retirement benefits to the deceased non-employee spouse's heirs is unjust. The majority opinion admits that "we held that it would be contrary to the entire contract, policy, and plan of the Federal Civil Service Act for nearly one-half of Mrs. Valdez's monthly payments to be taken from her and awarded to her deceased husband's adult children." Surely, the same could be said for Mr. Allard's retirement plan. Its purpose was not to support the youthful and vigorous. The decision of a majority of this Honorable Court to distinguish Valdez on the grounds of a joint survivorship option is also invalid. Retirement benefits belong with retirees, not devisees, absent a clear legislative indication to the contrary. Petitioner's failure to designate a joint survivorship option in

no way indicates that he intended to enable his wife to support young heirs with benefits garnered by Petitioner through his many years of hard work. Neither Mrs. Allard nor her heirs were designated beneficiaries of Petitioner's plan, and the plan provided that the benefits remain with Mr. Allard in the absence of a designated beneficiary.

Valdez clearly held that retirement plans are not probate asset:

"On the other hand, however, there are at least four categories of assets known as non-probate assets, and not subject to the rules of intestate distribution. Examples are...(3) property passing at death pursuant to terms of a contract, such as provided in life insurance policies and under contributory plans." 574 S.W.2d at 750.

Mr. Allard, just as Mrs. Valdez, had the right pursuant to Texas Family Cd. Section 5.22(a) to manage the

retirement plan as long as his actions were not fraudulent or oppressive toward his wife's interest. Just as in the case of Mrs. Valdez, Petitioner's management of the property was not unfair toward his wife and thus should be sustained. The rule adopted should be that applicable to life insurance contracts as in Estate of Korzekwa v. Prudential Ins. Co., 669 S.W.2d 775, 777 (Tex. App. [14th Dist.] 1984, writ dism.)

II. THE OPINION MISCONSTRUES SEC. 450 OF THE PROBATE CODE

The Court quotes section 450(a)(1) and (3) of the Texas Probate Code. It states that benefits under a pension plan "pass to a person designated by the decedent" and concludes that "since there is no indication that the decedent, Mrs. Allard, agreed to the disposition of the retirement benefits, there appears to be no valid reason to

deny Mrs. Allard the opportunity to dispose of her community interest in the retirement plan." There is no indication in the legislative history that this provision would have the extremely unusual consequence of empowering the non-employee spouse, if he or she died first, to designate the beneficiaries of an employee's plan thereby overriding the special community management rights and designation of the employee spouse. Were this construction of Probate Cd. sec. 450(a) correct, then Mr. Valdez, not Mrs. Valdez, should have had the right to designate the beneficiaries because he died first. Likewise, Mr. Allard could have controlled management of the plan and designation of beneficiary had he simply been the first to pass away. This construction of Probate Cd. sec. 450 would place it in direct conflict with sec. 5.22 of the Texas Family Cd., which

grants the employee spouse the right to manage the special community assets as long as there is no fraud on the non-employee spouse. "Decedent" in "person designated by the decedent" should be read as the employee spouse in the plan, not the non-employee spouse. Indeed, in the Valdez case, as here, the selection was made by the employee spouse who was still living. In this case, Mr. Allard has chosen to keep the benefits for himself under the terms of the plan by failing to designate a beneficiary. Unless this Honorable Court revises its original opinion and reverses its original decision, the ability to manage a retirement plan and designate a beneficiary will depend upon the vagaries of death rather than principles of special community management long ingrained in our law.

III. NEITHER PUBLIC POLICY LEGISLATIVE INTENT SUPPORTS THE MAJORITY DECISION

The majority next rejects the Petitioner's request that it apply the terminable interest rule or the rule of Valdez by observing: "We find no reason in this case to set aside the basic principles of community property law, which when applied in this case, entitled the non-employee spouse to her share of the retirement benefits." That Petitioner's wife is deceased and has no need for worldly support is reason enough. A decision applying Valdez or the terminable interest rule to a situation such as Petitioner's would still enable a non-employee's spouse to receive her fair share of the retirement benefits on divorce and her heirs to receive their fair share of all her other assets upon her death. As this Court recognized in Estate of Hanau v. or the terminable interest rule to a

situation such as Petitioner's would still enable a non-employee's spouse to receive her fair share of the retirement benefits on divorce and her heirs to receive their fair share of all her other assets upon her death. As this Court recognized in Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987) probate law and divorce law differ. In refusing to apply Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982), which authorized community characterization of separate property from civil law jurisdictions, to probate estates the Court observed that in "examining Rau, however, it is clear that the Court there refused to apply the rule to probate cases because 'the statutory regulation of rights of succession has been regarded as something apart from the determination of property rights between living persons.'" 730 S.W.2d at 665 (emphasis added).

The majority of this Honorable Court basically held against Petitioner because of a desire to allow the legislature to decide the issue: "In regard to Mr. Allard's request that this Court adopt the terminable interest rule, we decline to do so and conclude that such matters are better left to the legislature." The majority opinion, however, does not provide any evidence that the legislature intended the result reached by the majority. Nor has there ever been a Supreme Court decision authorizing the award of retirement benefits to the dead spouses of retirees. Unlike Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983), in which the Supreme Court acted to avoid injustice, this Honorable Court is not faced with the situation where the legislature through inaction has arguably adopted an unjust construction of a statute by a previous Court. Indeed, the legislature

very well concluded that Valdez v. Ramirez followed the enlightened policy of keeping retirement benefits in the hands of their intended beneficiaries.

Additionally, the legislature in Tex. Property Cd. sec. 42.0021, effective September 1, 1987, specifically provided that retirement plans are exempt from attachment, execution, or seizure for satisfaction of debts, unless the plan or contract does not qualify under the applicable provisions of the federal Employee Retirement Income Security Act of 1974 (Petitioner's plan does qualify). Clearly, this evidences a legislative intent that such plans only assist their designated beneficiaries, such as Mr. Allard, and not Mrs. Allard's heirs. Additionally, Tex. Property Cd. sec. 42.0021(b) provides that "[c]ontributions to an individual retirement account that exceed the

amount deductible under the applicable provisions of the Internal Revenue Code of 1986...are not exempt under this Section...." Obviously, this section evidences an intent to enable Texans to reap the full amount of IRS tax benefits. As discussed infra, this Court's decision will seriously interfere with, if not prevent, that goal.

In its criticism of the terminable interest rule, the majority opinion of this Honorable Court fails to distinguish the two components of the rule, one of which is unjust and one just, as argued by the dissenting opinion. Taking all benefits from a public employee's living original spouse and giving them all to the second spouse violates the most fundamental purposes of community property law and has been rightfully criticized [e.g. Justice Robertson's dissenting opinion in Lack

v. Lack, 584 S.W.2d 896 (Tex. Civ. App. - Dallas 1979, writ ref'd n.r.e.)]. However, the second component of the rule, prohibiting deceased non-employee spouses from bequeathing benefits earned and needed by the living employee, has both logic and fairness to commend it. As noted in the dissenting opinion, by looking at the function, and not just the label of retirement benefits, a majority of the Honorable Court could readily hold tht retirement benefits are property that are meant to be shared by the spouses and only the spouses. Justice Critz observed long ago that "the Court will not attribute to the Legislature an intention to work an injustice." State v. Mauritz Wells Co., 179 S.W.2d 238 (Tex. 1943). The Court's original opinion does just that without even an implicit indication to do so; and in fact, in contravention of Petitioner's special community

management rights specifically granted by the legislature under Tex.Family Cd. sec. 5.22.

IV. FEDERAL PRE-EMPTION

In the event that this Court does not apply the rule of Valdez or the terminable interest rule to keep Petitioner's benefits with Petitioner, then this Court's holding runs afoul of the Employee Retirement Income Security Act, 29 U.S.C. sec. 1001 et.seq. The Petitioners plan with General Dynamics is clearly engaged in commerce or in any industry or activity affecting commerce and is thus subject to ERISA coverage. 29 U.S.C. sec. 1003. ERISA contains express pre-emption provisions. 29 U.S.C. sec. 1144(a) and sec. 1144(b)(2)(B).

29 U.S.C. sec. 1056 provides that benefits cannot be alienated except for a "qualified domestic relations order," which "relates to the provision of child

support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant...." and "is made pursuant to state domestic relations law." 29 U.S.C. sec. 1056(d)(B)(ii)(I) and sec. 1056(d)(B)(ii)(II). The order of the lower Court and this Court does not accord property rights to the spouse, Mrs. Allard, but to her devisees, who are not dependents of the participant, Petitioner. Accordingly, this Court's decision squarely conflicts with supreme federal law. As evidenced by the note to 29 U.S.C. sec. 1001, the clarification of the anti-assignment and anti-alienation provision of ERISA became effective on January 1, 1985, and is applicable to all orders except those entered prior to January 1, 1985. Petitioner's order was entered subsequent to January 1, 1985, and thus

is subject to the previously mentioned requirements.

The very recent case of MacLean v. Ford Motor Co., 831 F.2d 723 (7th Cir. 1987), decided after granting of Petitioner's writ of error, clearly held that federal law pre-empted State probate law in determining the beneficiary of testator's employee pension plan. The Court held that the terms of decedent's plan beneficiary designation controlled over Indiana property law because of the express pre-emption provisions contained in 29 U.S.C. sec. 1144(a) and sec. 1144(b)(2)(B) 831 F.2d at 726. The Court noted that ERISA defines the term beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. sec. 1002(8).

The deceased Mrs. Allard's heirs do not meet this definition.

Acts or decisions preemptorily prohibited by Congress are defective jurisdictionally, are nullities, and may be attacked at any time collaterally or directly. Ex parte Hovermale, 636 S.W.2d 828, 831 (Tex. App. - San Antonio 1982, no writ). Further, Plaintiff would show that until the decision in this case by this Honorable Texas Supreme Court there was no reason to suspect a conflict between federal law and state law on this issue. Given the great importance of this issue to the people of Texas, Petitioner respectfully requests that the Court consider this matter on motion for rehearing or on remand to the lower Courts.

V. ADVERSE TAX CONSEQUENCES OF ALLARD

By holding that the non-employee spouse can bequeath one-half of her interest to whomsoever he or she wishes,

the rule announced in this case could run afoul of the Internal Revenue Code requirements for qualification. 26 U.S.C. sec. 401(a)(2) provides that no retirement plan is qualified unless it is impossible for the benefits or any part thereof to be required by anyone other than the "employees or their beneficiaries." Treasury regulation sec. 1.401(b)(4) define the term "beneficiaries" to only include "the estate of the employee, dependents of the employee, persons who are the natural objects of the employee's bounty, and any persons designated by the employee to share in the benefits of the plan after the death of the employee." An undesignated deceased spouse's estate, such as Mrs. Allard's does not meet this definition.

If a retirement plan is unqualified under the Internal Revenue Code, the employee is taxed on employer

contributions for his benefit, the plan's earnings are currently taxable to the employee, and tax advantages available on distribution are lost. The holding in this case could well lead to a disqualification of all Texas retirement plans with catastrophic consequences for most adult citizens of this State. As argued supra, the tax consequences of ERISA appear to have been expressly recognized as a legislative concern in Tex. Property Cd. sec. 42.0021(b). Petitioner respectfully requests that the tax implications of the original decision be carefully considered by this Court either on rehearing or by the lower court on remand.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Court reverse its original decision and render judgment granting Petitioner all his General Dynamics retirement

benefits or reverse and remand for further consideration the matters raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles B. Lewis, do hereby certify that a true and correct copy of the above and foregoing instrument was furnished to counsel of record by messenger delivery or by certified mail return receipt requested on this 18th day of May, 1988.

/s/ Charles B. Lewis

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-717 (2)

In The
Supreme Court of the United States
October Term, 1988

BILLY L. ALLARD,

Petitioner,

vs.

MARTHA PARTEN FRECH, INDEPENDENT EXECUTRIX OF THE ESTATE OF BILLIE J. ALLARD, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner waived his right to claim federal pre-emption of state law.

2. Whether the Texas Supreme Court correctly decided this case on the merits.

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RULES OF PROCEDURE:

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OPINION BELOW

The opinion of the Supreme Court of Texas is reported at 754 S.W.2d 111 (Tex. 1988) and is attached to Petitioner's appendix at page A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the Supreme Court of Texas.

STATUTES AND RULES OF PROCEDURE INVOLVED

Sup. Ct. R. 17 provides in pertinent part as follows:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> * * *
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

COUNTERSTATEMENT OF THE CASE

The Probate Court, Number Two of Tarrant County, Texas on March 13, 1986 ordered that one-half of the retirement benefits of Billie J. Allard, deceased, and Billy

L. Allard was owned by the Estate of Billie J. Allard pursuant to community property laws of the State of Texas. The trial court found that the retirement benefits were a vested community asset and that there was no written instrument or document signed by the deceased Billy J. Allard designating the disposal of her community interest in the retirement benefits.

Petitioner filed an appeal to the Court of Appeals at Forth Worth challenging the trial court's determination that retirement benefits received by Petitioner at time of his wife's death were community assets under state law. The Court of Appeals held that retirement benefits were a community asset.

Petitioner appealed to the Texas Supreme Court challenging the Court of Appeals ruling that the retirement benefits were a community asset and the Supreme Court affirmed the Court of Appeals. Petitioner in his Motion for Rehearing in the Supreme Court raised for the first time the argument that ERISA pre-empted state community property law. The Supreme Court did not rule on Petitioner's pre-emption argument.

—o—

REASONS FOR DENYING THE WRIT

The petition sought by Allard should be denied on three specific grounds:

1) no grounds of national importance for granting certiorari exist;

2) the petitioner waived his right to claim federal pre-emption of state law;

3) the Texas Supreme Court correctly decided this case on the merits.

The United States Supreme Court Rule of Civil Procedure Rule 17 mandates that review by writ of certiorari is not a matter of right, but of judicial discretion. The Rule sets out three non-binding criteria used by the Supreme Court when deciding whether or not to grant a writ or not. The petitioner fails to meet any of the three.

While the petitioner claims that this case involves issues of great national importance, he failed to raise the issue of federal pre-emption of Texas community property law in the pension regulation area until after the Texas Supreme Court ruled on the merits of the petitioner's case. No Texas court has ruled on the issue of pre-emption of community property law as framed by petitioner in his Petition for Writ of Certiorari. Accordingly, there exists no conflict between Texas law and federal law.

Whether or not ERISA serves the vital federal goal of establishing pension plan regulation as an exclusive federal concern to the exclusion of Texas community property law, as the petitioner claims, no Texas court has ruled on that issue. (Petitioner's Writ, p. 9). The Texas Supreme Court correctly ruled on the merits as presented by petitioner and that ruling was based on a sound interpretation of Texas community property law. The United States Supreme Court has said, "we have no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis,* 476 U.S. 380, 106

S.Ct. 1904, 90 L.Ed.2d 389 (1986). Texas community property law mandates an equal division of marital assets as was done in this case, and the petitioner raised no federal law which might have required a different ruling by the Texas Courts.

Secondly, pre-emption is not available for review. The petitioner concedes its failure to raise the issue of pre-emption of Texas community property law by the Employee Retirement Security Act until its Motion for Rehearing in the Texas Supreme Court. Texas and federal law do not allow a litigant to raise federal pre-emption, as a choice of law matter, in a direct or collateral attack at any time.

Petitioner maintains that "Texas and federal law allow the question of federal pre-emption, as a jurisdictional matter, to be raised at any time, as a direct or collateral attack." (Petitioner's Writ, p. 19). However, there exists no jurisdictional dispute in this case but rather a choice of law dispute, i.e., the dispute could be litigated in state or federal court. *See Dueringer v. General American Life Insurance Company,* 842 F.2d 127, 130 (5th Cir. 1988) (ERISA pre-emption clearly is a choice of law question and therefore must be asserted as an affirmative defense).

The petitioner mis-cites *International Longshoremen's Association v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed. 2d 389 (1986), for the proposition that one may raise pre-emption of state law by ERISA at any time. *Longshoremen's* involved the National Labor Relations Act which provides for a sole and specific forum in which labor disputes within the National Labor Relations Act must be heard. Since the Court in *Longshoremen's* determined that

the dispute was jurisdiction and not choice of law, then jurisdiction could be raised at any time.

Such is not the case with ERISA. ERISA is solely substantive federal law which may be applied at the state or federal level. ERISA, unlike the NLRA, does not require that disputes within its statutory scope be heard in a specific forum, hence state or federal court may exercise valid jurisdiction over a pension dispute and it is up to the litigants to raise the applicability of ERISA as a choice of law if the litigant wants federal law applied instead of state law.

Thirdly, the respondent does not dispute the pre-emptive force of ERISA in the pension regulation area. However, the petitioner cites cases (Petitioner's Writ, pp. 16-17) in which the pre-emption mandated by the Supreme Court did not serve to undermine an ancillary body of law, i.e., community property law, as would occcur in this case if absolute pre-emption is found.

ERISA does not necessarily "serve[] the vital federal goal of establishing pension plan regulation as an exclusive federal concern and avoiding the confusion and chaos of a patchwork of local regulations," as claimed by petitioner. (Petitioner's Writ, p. 9). The passage of the Retirement Equity Act (REACT) amendments to ERISA, effective January 1, 1985, as a clarification of ERISA, worked to accommodate state law with federal law and to preserve the community property laws of the eight community property states. The REACT amendments serve as Congressional notice that ERISA was not intended to pre-empt entirely a state's community property law, since REACT clearly dictates that qualified domestic relation

orders are not pre-empted by ERISA. It follows that REACT was passed in order to make ERISA more accommodative to the laws of community property states, and not in order to enact sweeping pre-emption of community property law.

While admittedly REACT fails to address probate orders which affect pension benefits, in this case the probate order was made pursuant to the very community property law which Congress sought to accommodate through passage of the REACT amendments. Texas community property law hardly represents "a patchwork of local regulations," deserving of total pre-emption as claimed by petitioner, and for the reasons hereinabove does not conflict with ERISA. To argue otherwise would be to suggest that Congress intended to jeopardize the entire body of state community property law by pre-emption in the pension area.

The case of *In Re Marriage of Campa*, 152 Cal. Rptr. 362 (1979) formulated some factors important to this analysis of whether ERISA pre-empts a state's community property law. A few factors considered by the *Campa* court at 368 paraphrased here include:

(1) Community property law as applicable to the case before us is concerned with effectuating a fair division of the monthly pension check between the former spouses. This concern plainly has no bearing on the effort of Congress embodied in ERISA, to assure genuine pension rights:

(2) Domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts.

Furthermore, ERISA was enacted in order to legislate pension reform aimed toward eradicating inadequate, mismanaged and illusory pension plans which had left many hard working individuals with little financial security in their senior years. House report number 93-533 (1974) U.S. Code Congress and Admin. News, p. 4639, et seq. An equitable division of pension benefits under Texas community property law between live spouses pursuant to divorce or between a live spouse and a dead spouse's estate only works to give partners in marriage or their heirs what is rightfully theirs and the disposition of benefits in no way conflicts with ERISA. Both ERISA and community property law work complement each other in providing pension security for both spouses or their heirs and Texas community property law accomplishes important objectives that do not conflict with those of Congress.

Lastly, ERISA and the REACT amendments do not provide for termination of a non-employee spouse's interest in the other spouse's pension benefits after the death of the non-employee spouse. Therefore, there is no apparent conflict between ERISA and Texas community property law on the issue of whether a deceased spouse's interest in pension benefits terminates and Texas community property law applies. Since there was no testamentary agreement between the spouses as to an equitable division of the pension benefits, only Texas community property law can equitably ensure that both spouses or their heirs are treated fairly.

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CONCLUSION

WHEREFORE, Respondent Martha Parten Frech, Independent Executrix of the Estate of Billie J. Allard, Deceased prays that this Honorable United States Supreme Court deny Petitioner's application for Writ of Certiorari.

Respectfully submitted,

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NO. 88-717

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1988 TERM

BILLY L. ALLARD, PETITIONER
VS.
MARTHA PARTEN FRECH,
INDEPENDENT EXECUTRIX OF THE ESTATE
OF
BILLIE J. ALLARD, DECEASED, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF AMICUS CURIAE, EMPLOYEE BENEFITS COMMITTEE OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 88-717

IN THE SUPREME COURT OF THE UNITED STATES

October 1988 Term

BILLY L. ALLARD, Petitioner
vs.
MARTHA PARTEN FRECH,
Independent Executrix of the Estate
of
BILLIE J. ALLARD, Deceased, Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF AMICUS CURIAE, EMPLOYEE BENEFITS COMMITTEE OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus curiae, Employee Benefits Committee of the Section of Taxation of the State Bar of Texas, supports the petition for writ of certiorari because the Supreme Court of Texas has decided important questions of federal law that have not been, but should be, settled by this Court: Does the Employee Retirement In-

come Security Act of 1974, as amended ("ERISA"),[1] preempt either Texas community property law after the death of a pensioner or his spouse or the Texas laws of testamentary disposition (or intestate succession) to the extent that they relate to a spouse's community property interest in a Plan.[2] Is ERISA an affirmative defense which is waived if not raised in the court of first instance? The second question was not raised, and could not have been raised, in the trial court. (If Petitioner had raised the ERISA issues in the trial court, the waiver question would never have arisen.) This case also involves the Internal Revenue Code of 1986,

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[1]Citations throughout this brief are to the provisions of ERISA or the Internal Revenue Code; see the Table of Authorities for parallel U.S.C. citations.

[2]As used in this brief, the terms "Plan" and "Plans" refer to any employee retirement income or deferred compensation arrangement regulated by ERISA.

as amended (the "Code").

AMICUS CURIAE'S INTEREST

Amicus curiae is interested in this litigation because its members draft Plans for employers, advise employers about the administration of Plans, advise Plan fiduciaries (trustees and plan administrators) about their duties, represent employers and Plan fiduciaries before the Internal Revenue Service (IRS) and in the courts with respect to Plans, prepare estate plans, wills, and trusts for participants in Plans and their beneficiaries, probate estates of participants in Plans, and advise participants in Plans about federal tax questions relating to their Plan benefits. It is important that a Plan be qualified for federal tax purposes, because disqualification has four Draconian consequences.

First, under Code Sec. 404(a), employer payments to a stock bonus, pension, profit-sharing, or annuity plan generally not deductible unless the plan is qualified under Sec. 401(a), except to the extent allocated to nonforfeitable individual accounts. Second, under Code Sec. 402(b), such allocations are taxable currently to the participants. Third, under Code Sec. 402, the favorable tax treatment provided for the beneficiary of a stock bonus, pension, or profit-sharing trust is only available if the trust is qualified under Sec. 401(a). Fourth, under Code Sec. 501(a), a stock bonus, pension, or profit-sharing trust is not exempt from income tax unless it is qualified under Sec. 401(a).

If a Plan obeys a court order directing payment of a participant's benefit to

any person other than the participant or his duly designated beneficiary, its qualified (tax-exempt) status will, according to IRS rulings, be adversely affected unless the order is a qualified domestic relations order (QDRO), i.e., one which complies with ERISA Sec. 206(d)(3)(B) and Code Sec. 414(p). See Letter Ruling 8811052, December 22, 1987, in which the IRS ruled that a Plan could obey a court order requiring payment of alimony to a participant's former wife, because the order was a QDRO. Cf. Letter Ruling 8010051, December 12, 1979, in which the IRS ruled that a Plan would be disqualified if it obeyed a court order requiring payment of back alimony before benefits would be in pay status under the Plan, and Letter Ruling 8131020, May 5, 1981, in which the IRS ruled that obeying a United

States Bankruptcy Court pension deduction order in proceedings under Chapter 13 of the Bankruptcy Reform Act of 1978 would disqualify a Plan.

Plans hold a large proportion of the national wealth. A substantial fraction of the nation's population resides, or has resided, in community property states. Certainty in the law governing the qualification of Plans as tax-exempt entities is essential.

THE DECISION BELOW WILL DISQUALIFY EVERY PLAN WITH A MARRIED TEXAS PARTICIPANT

Code Sec. 401(a) and Treas. Reg. §1. 401-1(a)(3)(ii) require a Plan to be for the exclusive benefit of employees and their beneficiaries. Treas. Reg. §1.401-1(b)(1) permits incidental death benefits. Rev. Rul. 72-241, 1972-1 C.B. 108, provides that a settlement option under a Plan will satisfy the requirement

> . . . that benefits payable to the beneficiary of an employee must be incidental to the primary purpose of distributing accummulated funds to the employee, if it contains certain provisions whereby the present value of the payments to be made to the participant is more than 50 percent of the present value of the total payments to be made to the participant and his beneficiaries. [Emphasis supplied.]

Rev. Rul. 74-360, 1974-2 C.B. 130, provides that Rev. Rul. 72-241 "does not permit distributions to persons other than the participant prior to his death."

The decision below violates both of these requirements. It awards 50 percent of Petitioner's pension to Respondent, thus failing to leave him more than 50 percent of the total payments. It awards this 50 percent now, prior to Petitioner's death. If the decision below stands as the law applicable to Plans with married Texas participants, every such Plan will fail to meet the requirements that bene-

fits to persons other than participant be only incidental to the participant's benefits and that, while the participant lives, benefits be paid only to the participant.

THE MAJORITY OPINION BELOW IGNORES ERISA

Five justices of the Supreme Court of Texas did not even explain why ERISA is not relevant to this case. The Chief Justice concurred only because the ERISA issue was not raised in the trial court. Three justices dissented because they thought ERISA compelled the opposite result.

SUMMARY OF ARGUMENT

Under controlling federal law regulating Plans, Plan benefits can be community property as long as both parties live, and can be divided by the court in the event of divorce by means of a QDRO; but, when one spouse dies, the other must

be entitled to 100 percent of the Plan benefits, unless the survivor has consented to a different beneficiary designation in the manner prescribed by ERISA Sec. 205(c) and Code Sec. 417(a).

ERISA PREEMPTS THE LAWS OF THE STATE OF TEXAS INSOFAR AS THEY RELATE TO PLANS

ERISA Sec. 514(a) contains a broad preemption provision under which ERISA[3] preempts

> . . . any and all State laws[4] insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [of ERISA] and not exempt under section 4(b) [of ERISA].

The breadth of ERISA's preemptive provision was recently emphasized by this Court, as follows:

---

[3]The Code does not preempt state law like ERISA, but violating the Code produces the draconian results described above.

[4]ERISA Sec. 514(c)(1) broadly defines "State law" as including "all laws, decisions, regulations, or other State action having the effect of law, of any State."

> . . . the express preemption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern. Pilot Life Insurance Company v. Dedeaux, 481 U.S. _____, 107 S.Ct. 1549, 1552, 95 L Ed. 2d 39, 46 (1987).

The General Dynamics Corporation's pension plan (GDC Plan) is described in ERISA Sec. 4(a) and is not exempt under ERISA Sec. 4(b).

This case presents an outstanding opportunity for this Court to clarify the application of its decision in Mackey v. Lanier Collection Agency & Service, Inc., ____ U.S. ____, 108 S. Ct. 2182, 100 L Ed. 2d 836 (1988).

The prevailing view of the extent of ERISA preemption of state law is illustrated by MacLean v. Ford Motor Company, 831 F.2d 723 (7th Cir. 1987), which involved typical facts -- the beneficiaries of the decedent's probate estate and the

beneficiaries designated by the decedent under Ford's retirement plan were different persons. The court could have decided the case the same way merely by holding that the retirement benefits were a nonprobate asset whose disposition was controlled by the contract -- the beneficiary designation filed by the decedent with the plan. Instead, the court found that the state testamentary law had a connection with the plan because, if applied, state law would determine the distribution of the assets under the plan. Therefore, the state testamentary law related to the Ford plan and was preempted by ERISA. See also the cases cited in MacLean, supra.

The decision below is contrary to the trend in this Court, which found federal preemption of state community property law in the case of Railroad Retirement Act

benefits, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), military retired pay, McCarty v. McCarty, 453 U.S. 210 (1981), and Servicemen's Group Life Insurance, Ridgeway v. Ridgeway, 454 U.S. 46 (1981).

AS APPLIED IN THIS CASE, TEXAS COMMUNITY PROPERTY LAW AND TEXAS LAW OF TESTAMENTARY DISPOSITION CONFLICT WITH BENEFIT FORMS AND BENEFICIARY DESIGNATION RULES REQUIRED BY ERISA AND THE CODE

There is no indication in the statutes or legislative histories that Congress intended to distinguish between participants and spouses in common law states and those in community property states or that Congress intended for state community property laws to invalidate the requirements of ERISA and the Code. No purpose for such a rule is apparent in the statute or legislative histories. There is no reason to believe that Congress intended that a participant or spouse who received qual-

ified retirement plan benefits would hold half of them in a constructive trust for the deceased spouse's heirs or legatees. A divorce court can divide Plan benefits between the participant and his[5] spouse, if the requirements for a QDRO are satisfied. See ERISA Sec. 206(d)(3)(B) and Code Sec. 417. Upon death of either, however, his interest in the Plan must cease.

To hold otherwise would lead to illogical consequences, which Congress could not have intended. For example, in the case of a profit-sharing or stock bonus plan which did not provide annuities, if a Texas participant died first, the balance in his account would have to be payable to his spouse because he could not have elected otherwise without her consent.

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[5]For convenience, the masculine pronoun is used through-out this brief; but the law applies equally to female participants with male spouses.

See paragraphs (b)(1)(C)(i) and (c)(2) of ERISA Sec. 205 and Code Sec. 401(a)(11)(B)(iii). On the other hand, if his spouse died first, 50 percent of the then account balance would pass to the spouse's heirs. Congress could not have intended such an inequitable result.

If the parties resided in a common law state, a participant in a profit-sharing or stock bonus plan would be entitled to all the benefits as long as he lived, no matter when his spouse died. Whatever was left in the account when the participant died would automatically be paid to his spouse. There is no reason to believe that Congress intended a different result in community property states. If Congress intended a different result, it would have said so; it would not have expected state courts to apply the constructive trust

doctrine.

In the case of defined benefit pension plans, money purchase pension plans, and annuity plans, where qualified preretirement survivor annuities and qualified joint and survivor retirement annuities are required by ERISA Sec. 205(a) and Code Sec. 401(a)(11) and Sec. 417, Congress was similarly concerned only with the participant and his spouse. If Congress had intended different results in common law and community property states, it would have spelled out those results in the statute; it would not have expected the state courts to apply the constructive trust doctrine.

ERISA AND THE CODE PERMIT THE DIVISION OF PLAN BENEFITS ONLY UNDER QDROS

ERISA Sec. 206(d)(1) requires every pension plan to "provide that benefits

provided under the plan may not be assigned or alienated." ERISA Sec. 206(d)(3)(A) provides an exception to this nonassignment and nonalienation rule for payments made under QDROs. To qualify as a QDRO, an order must be a domestic relations order, which ERISA Sec. 206(d)(3)(B)(ii) defines as follows:

> the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--
>
> > (I) relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
> >
> > (II) is made pursuant to a State domestic relations law (including a community property law).

The order entered in this case does not qualify as a "domestic relations order." It would be illogical to read this statute as including an

> . . . order . . . which . . . relates to the provision of . . . marital property rights to a . . . child or other dependent of a participant . . . .

Congress intended only to permit an order to provide child support to a child or other minor dependent of a participant. Alimony payments and marital property rights can only be awarded to a spouse or former spouse.

THE DECISION BELOW VIOLATES ERISA'S EXCLUSIVE BENEFIT RULE

ERISA Sec. 403(c)(1) provides that (with exceptions not relevant to this case)

> . . . the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to the participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

ERISA Sec. 3(7) defines the term participant as

> . . . any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such

> employer. . . or whose beneficiaries may be eligible to receive such benefits.

ERISA Sec. 3(8) defines the term "beneficiary" as

> . . . a person designated by a participant, or by the terms of an employee benefit plan, who is or may be entitled to a benefit thereunder.

Respondent is not a participant or beneficiary in the GDC Plan.

THE DECISION BELOW VIOLATES THE PLAN DOCUMENT RULE

ERISA Sec. 404(a)(1)(D) requires a fiduciary to discharge his duties with respect to a Plan solely in the interest of the participants and beneficiaries and in accordance with the documents and instruments governing the Plan. The GDC Plan, like all Plans, permits payment only to participants and beneficiaries, or as provided in a QDRO.

IS ERISA AN AFFIRMATIVE DEFENSE WHICH IS WAIVED IF NOT RAISED IN THE TRIAL COURT?

Petitioner did not raise the ERISA issues in the lower Texas courts. Did he waive this defense? See Dueringer v. General American Life Ins. Co., 842 F.2d 127 (5th Cir. 1988). For a similar Texas rule, see 5 Texas Jur (Third Edition), Appellate Review, §593, p.307 (1980). This federal question (and the parallel state question) could not have been raised in the court of first instance because, if Petitioner had raised the ERISA issues in the trial court, the waiver question would not be in this case.

CONCLUSION

Amicus curiae requests this Court to grant the petition for writ of certiorari and to decide the important federal questions inherent in this case under ERISA.

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of Amicus Curiae, Employee Benefits Committee of the Section of Taxation of the State Bar of Texas, in Support of Petition for Writ of Certiorari were served on Henry E. Kerry, Esq., Kerry & Forderhase, Suite 900 River Plaza, 1700 River Run, Fort Worth, Texas 76107, and John R. Lively, Esq., Fort Worth Club Tower, Suite 1130, Fort Worth, Texas 76102, by depositing them in the U.S. mail, postage prepaid, on November _____, 1988.

Stanley C. Simon